FILED
JAN 2 1923
WM. R. STANSBURY
CLERK

In the Supreme Court of the United States

October Term, 1922

Nos. 659, 660, 661, 662, 666, 667, 668, 669, 670, 678, 693, 694.

THE CUNARD STEAMSHIP COMPANY, LTD., *and* ANCHOR LINE (HENDERSON BROS.) LTD., Appts.,

THE OCEAN STEAM NAVIGATION COMPANY, LTD., Appts.,

INTERNATIONAL NAVIGATION COMPANY, LTD., Appts.,

CAMPAGNIE GENERALE TRANSATLANTIQUE, Appts.,

THE NETHERLANDS-AMERICAN STEAM NAVIGATION CO., (HOLLAND-AMERICAN LINE), Appts.,

LIVERPOOL, BRAZIL AND RIVER PLATE STEAM NAVIGATION COMPANY, LTD., Appts.,

THE ROYAL MAIL STEAM PACKET COMPANY, Appts.,

UNITED STEAMSHIP COMPANY OF COPENHAGEN, (SCANDINAVIAN-AMERICAN LINE), Appts.,

PACIFIC STEAM NAVIGATION COMPANY, Appts.,

NAVIGAZIONE GENERALE ITALIANA, Appts.,

vs.

ANDREW W. MELLON, Secretary of Treasury of the United States, et al.

INTERNATIONAL MERCANTILE MARINE COMPANY, Appts.,

vs.

H. C. STUART, Collector of Customs of the Port of New York and RALPH A. DAY, Federal Prohibition Director, et al.

UNITED AMERICAN LINES, Appts.,

vs.

H. C. STUART, Collector of Customs of the Port of New York and JOHN D. APPLEBY, Federal Prohibition Zone Chief, et al.

On Appeal from the United States District Court for the Southern District of New York

BRIEF AMICI CURIAE.

ANDREW WILSON,
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Attorneys, Amici Curiae.

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In the Supreme Court of the United States.

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Appeals from the United States District Court for the Southern District of New York.

BRIEF AMICI CURIAE ON BEHALF OF DEFENDANT.

Agreeable to the permission of the court this brief is filed in the hope that it will prove helpful in the solution of the questions of law involved.

STATEMENT.

This brief is submitted in support of the following propositions of law which are determinative in these cases.

The transportation, possession or furnishing of intoxicating liquors for beverage purposes upon vessels of the United States at all places and upon foreign vessels within the territorial waters of the United States is unlawful under the Eighteenth Amendment to the Constitution of the United States and the National Prohibition Act.

I. THE EIGHTEENTH AMENDMENT PROHIBITS ALL TRANSPORTATION OF INTOXICATING LIQUORS FOR BEVERAGE PURPOSES WITHIN THE UNITED STATES AND ALL TERRITORY SUBJECT TO THE JURISDICTION THEREOF.

The Eighteenth Amendment insofar as it is applicable to this question provides:

> "The * * * transportation of intoxicating liquors within * * * the United States, and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited. * * *"

This prohibition flows from an amendment to the Constitution. The amendment not only lays the prohibition but defines the extent of its jurisdictional application. The language of the article is comprehensive and prohibits all transportation of intoxicating liquors within the United States and all territory subject to the jurisdiction thereof for beverage purposes. This amendment institutes a new policy upon the part of the national government and confers upon Congress a portion of the police power heretofore residing solely in the states.

In any attempt to apply the decisions of this court construing the territorial application of acts of Congress and to reason therefrom in their application to the Eighteenth Amendment, certain fundamental differences must be noticed. In the original Constitution of the United States there were two clauses which conferred upon Congress authority to legislate with reference to ships upon the high seas. They were: Article I, Section 8, Clause 10, which provides in defining the legislative power of Congress, "that Congress shall have power * * * to define and punish piracies and felonies committed on the high seas and offenses against the law of nations"; and Article III, Section 2, which provides that "judicial power shall extend * * * to all cases of admiralty and maritime jurisdiction * * * ."

Examining these two sections of the original Constitution it will be observed that they do not lay any prohibition or define any offense. The first specifically provides that Congress shall have power to punish piracies and felonies, the second merely defines the jurisdiction of the courts. Therefore, under these two sections of the

original Constitution until there was a plain legislative enactment upon the part of Congress indicating an intent to punish a specific offense upon the high seas the court had no jurisdiction to try and punish such offenders, and in all of the decisions by this court construing the acts of Congress enacted pursuant to these powers the question was always, has Congress exercised this power conferred?

When consideration is given to the Eighteenth Amendment a very fundamental and material difference is apparent. The Eighteenth Amendment represents a changed policy by the sovereign people through the addition of a new principle to the organic law. It in itself lays a prohibition and defines the extent of its application by declaring that its provision shall apply to the United States and all territory subject to the jurisdiction thereof. In this case there is no need to determine whether Congress has legislated to create an offense upon the high seas. The amendment itself does that and imposes upon Congress the duty of enacting appropriate legislation for its enforcement. In other words the offense is declared by the Constitution and in this instance the source of power is not alone that derived from the clauses of Article I or Article III, above quoted. The Eighteenth Amendment is co-ordinate and co-existent with the articles of the original Constitution. Because the Eighteenth Amendment is a part of the Constitution and in terms defines the extent of its operation the legislation enacted by Congress for its enforcement must be co-extensive with the amendment itself. The only similar principle in the Constitution to that embodied in the Eighteenth Amendment is that found in the Thirteenth Amendment prohibiting slavery, which also defines the extent of its operation. See the language of Justice Brown in Downes *vs.* Bidwell, 182 U. S. 45, 44 L. Ed. 1088, 1092.

and in comprehensive terms defined the scope within which the prohibition was to apply is indicative of an intention upon the part of the people of the United States that there should be nothing left to surmise or implication as to the extent of its operation.

This court in its decision in the case of Rhode Island vs. Palmer, 253 U. S. 350, 64 L. Ed. 946, in which it upheld the validity of the amendment and the constitutionality of the National Prohibition Act enacted for its enforcement, said:

> "The first section of the amendment—the one embodying the prohibition—is operative throughout the entire territorial limits of the United States, binds all legislative bodies, courts, public officers, and individuals within those limits, and of its own force invalidates every legislative act—whether by Congress, by a state legislature, or by a territorial assembly—which authorizes or sanctions what the section prohibits."

It will be observed that the court uses the words "is operative throughout the *entire* territorial limits of the United States." These are not words of limitation. If the court had intended to use restrictive language in connection with the interpretation of the Amendment it would have used the phrase "actual territorial limits." The phrase "actual territorial limits" is one which is well understood in international law when the purpose is to refer to the actual confines of a country and the territorial waters over which jurisdiction is commonly exercised as a matter of sovereign right under international law.

The contention that the use of the words "territorial limits" is indicative of an intention to refer simply to lands is based upon a mis-apprehension. If it is attempted to limit the use of the words "territorial limits" simply to lands by the adoption of a literal construction, such as is contended for by those urging the narrow interpretation,

it would be possible to go still further and say that the Eighteenth Amendment has no application to the navigable waters of this country since they are not a part of the land. The phrase "entire territorial limits" employed by the court, is properly susceptible of no such interpretation. Mr. Chief Justice White, in his concurring opinion in speaking of the prohibition laid in the amendment, said:

> "In the first place, it is indisputable, as I have stated, that the first section imposes a general prohibition which it was the purpose to make universally and uniformly operative and efficacious."

II. THE NATIONAL PROHIBITION ACT PROHIBITS ALL TRANSPORTATION, POSSESSION OR FURNISHING OF LIQUOR EXCEPT WHERE EXPRESS AUTHORIZATION THEREFOR IS FOUND IN THE ACT. THOSE WHO SEEK TO SET UP AN EXCEPTION MUST ESTABLISH IT AS BEING WITHIN THE WORDS AS WELL AS THE REASON THEREOF.

Section 3 of Title II of the National Prohibition Act provides:

> "No person shall on or after the date when the Eighteenth Amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this Act, and all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented."

This statute enacted by Congress for the enforcement of the Eighteenth Amendment is co-extensive with the operation of the amendment itself. Upon this point this court said in Rhode Island *vs.* Palmer; 253 U. S. 350, 64 L. Ed. 946:

> "The power confided to Congress by the provisions of the Eighteenth Amendment to the Federal Constitution, that 'the Congress and the several states shall have concurrent power to enforce this article by appropriate legislation,' while not exclusive, is *territorially co-extensive with the prohibition of that Amendment,* embraces manufacture and other intrastate transactions as well as importation, exportation, and interstate traffic, and is in no wise dependent on or affected by action or inaction on the part of the several states or any of them." (Italics ours.)

The National Prohibition Act not only prohibits the transportation and sale of intoxicating liquors for beverage purposes but also prohibits the possession and furnishing of such liquors for beverage purposes except where specific authorization is made therefor in the Act.

The general rule of statutory construction is that even an expressed proviso carves special exceptions only out of a general enacting clause; and that those who set up any such exception must establish it as being within the words as well as the reason therefor.

United States *vs.* Dickson, 15 Pet. 141, 165, 10 L. Ed. 689; Ryan *vs.* Carter, 93 U. S. 78, 83, 23 L. Ed. 807; Schlemmer *vs.* Buffalo Railway, 205 U. S. 1, 10, 27 Su. Ct., 407, 51 L. Ed. 681; United States *vs.* Trinity Railway (5th Circuit), 211 Fed. 448, 453, 128 C. C. A., 120.

In the instant case there is no express proviso authorizing the transportation, possession, or furnishing of beverage liquors on ships.

In all of the prohibition laws of the states which prohibit the manufacture, sale, transportation, etc., of intoxicating liquor except as authorized by the law, those who claim the right to make or possess such liquor must set forth the provisions in the law which authorized them to have control of the liquor. This is the form of the prohibition in Section 3 of the National Prohibition Act.

These laws do not confine the prohibition to the beverage liquor traffic, but prohibit intoxicating liquors for all purposes except as authorized in the Act. Those who desire to make, sell, transport or possess liquor under a general prohibition of such Acts must do so under some specific exception named in the law. In the recent case of Crane *vs.* Campbell, 245 U. S. 304, in construing the statute of the State of Idaho which prohibited the possession of whisky even for medicinal purposes, this court sustained the decision of the State Supreme Court that held:

> "The only means provided by the Act for procuring intoxicating liquors in the prohibition district for any purpose relates to wine to be used for sacramental purposes and pure alcohol to be used for scientific or mechanical purposes, or for compounding or preparing medicines, so that the possession of whisky, or of any intoxicating liquor, other than wine and pure alcohol for the uses above mentioned is prohibited."

Section 15 of the State law provides:

> "It shall be unlawful for any person to import, ship, sell, transport, deliver, receive or have in his possession any intoxicating liquors except as in this Act provided."

The full text of the statute of Idaho setting forth the exceptions will be found in the decision of the State Supreme Court in *Ex Parte* Crane, 151 Pac. Rep. 1006.

In construing the National Prohibition Act the Circuit Court of Appeals, Sixth Circuit, in Small Grain Distilling & Drug Company *vs.* Hamilton, 276 Fed. 544, said:

> "The prohibitory language of sections 3 and 6 is prima facie universal; those who seek to show a right within the exceptions stated must make that right clear."

That this is the rule adopted in the construction of prohibitory laws is well established. The Supreme Court of

Utah in construing an act of the Legislature of that State (Laws 1917, Ch. 2) State *vs.* Certain Intoxicating Liquors, 172 Pac. 1050, prohibiting all sale, manufacture, use and posession of intoxicating liquor except as authorized, in answer to the contention that the statute did not prohibit the possession of liquor acquired prior to the date upon which the act became effective and intended for the personal use of the owner, said:

> "(1) No exceptions being made in the act other than the foregoing, we think it is made clear by the sections quoted that it was the legislative intent to not only forbid the possession but to abolish property rights in alcoholic liquors within the confines of the State after August 1, 1917, aside from the exceptions expressly provided for in the Act, no matter when or how acquired, for what use intended, or in what place kept or possessed. * * *"

Other illustrations of this are found in the decisions of the Supreme Court of Washington, case of State *vs.* Giaudrone, 186, Pac. 870; the decision of the Supreme Court of Nebraska in the case of Fitch *vs.* State, 167 N. W. 418.

This principle was again sustained by this court in the recent case of Grogan *vs.* Walker, wherein it was said:

> "The manufacture, possession, sale and transportation of spirits and wine for other than beverage purposes are provided for in the act, but there is no provision for transshipment or carriage across the country from without. When Congress was ready to permit such a transit for special reasons, in the Canal Zone, it permitted it in express words. Title III, Section 21, 41 Stat. 322."

III. THE RIGHT OF CONGRESS TO PROHIBIT THE POSSESSION OF INTOXICATING LIQUORS IS WELL ESTABLISHED. IT IS APPROPRIATE LEGISLATION FOR THE ENFORCEMENT OF THE EIGHTEENTH AMENDMENT.

The Circuit Court of Appeals for the Ninth Circuit in the case of Page *vs.* United States, 278 Fed. 41, held:

> "The restrictions on the possession of intoxicating liquors contained in National Prohibition Act, Title II, Section 3, are reasonably adapted to the enforcement of the prohibition against the unlawful manufacture, sale, or transportation of intoxicating liquors under the Eighteenth Amendment, so that such restrictions are not beyond the power of Congress to enact."

A writ of certiorari was denied by this court in this case. 258 U. S. ———, 42 Su. Ct. 461, 66 L. Ed. ———.

The Circuit Court of Appeals, for the Eighth Circuit in the case of Massey *vs.* United States, 281 Fed. 293, held:

> "Under Const. Amend. 18, prohibiting the manufacture, sale, and transportation, but not the possession, of intoxicating liquor, section 2 of which gives Congress power to enforce the amendment by appropriate legislation the provisions of the National Prohibition Act making the possession of intoxicating liquor unlawful was reasonably proper to enforce the prohibition against the manufacture and sale of such liquor, so as to be within the power of Congress, even though the statute may embrace some instances in which possession is not the result of unlawful manufacture, sale, or transportation."

This court in passing upon the alleged Constitutional right to possession of liquor for beverage purposes held in the case of Crane *vs.* Campbell, 245 U. S. 304, 62 L. Ed. 304:

> "The mere possession of whisky for personal use may be rendered criminal by state legislation without abridging privileges or immunities of citizens of the United States, or depriving a person of life, liberty, or property without due process of law."

The Supreme Court of Alabama in the case of Phelps *vs.* State, 75 So. 877, held:

> "It is a violation of the prohibition law for defendant to retain in his possession liquors that were owned and possessed by him before the law became operative."

See also State *vs.* Certain Intoxicating Liquors, (Utah) 172 Pac. 1050; Jones *vs.* State, (Ala.) 85 So. 839; State *vs.* Giaudrone, (Wash.) 186 Pac. 870; Lacount *vs.* State, (Ga.) 104 S. E. 920; People *vs.* Stambosva (Mich.) 178 N. W. 226; State *vs.* Macek, (Kan.) 180 Pac. 985; Bank *vs.* State, (Texas) 230 S. W. 994; People *vs.* Sandy, (Colo.) 203 Pac. 671.

In the instant case there is no express proviso in the National Prohibition Act itself, there is no provision in any treaty nor is there other statutory authority authorizing transportation, possession or the furnishing of beverage liquors on vessels of the United States anywhere or upon foreign vessels within the territorial waters of the United States. Such an exception can arise only by implication. The position of the shippers in the Grogan case was much stronger. In that case they relied upon the express provisions of a treaty and the terms of Section 3005 of the Revised Statutes of the United States. In the instant case the exception can arise only by implication. Implied exceptions are not favored and can arise only where to adopt a literal construction would defeat the purpose of the legislation. This necessitates a consideration of the purpose of the Eighteenth Amendment and National Prohibition Act.

IV. THE PURPOSE OF THE EIGHTEENTH AMENDMENT IS CONCLUSIVE OF ITS CORRECT CONSTRUCTION.

The Supreme Court said in the case of Maxwell *vs.* Dow, 176 U. S. 580, 44 L. Ed. 597, of the rule of construction to be applied to constitutional amendments:

> "The language of a constitutional amendment should be read in connection with the known condition of affairs out of which the occasion for its adoption may have arisen, and then construed, if there be therein any doubtful expressions, in a way, so far as is reasonably possible, to forward the known purpose or object for which the amendment was adopted."

The ultimate purpose of all prohibition statutes is to prevent the consumption of intoxicating liquors for beverage purposes. The Supreme Court of Alabama in the case of Southern Express Company *vs.* Whittle, 194 Ala. 406, 69 So. 652, said:

> "The object and purpose of all laws governing the subject of intoxicating liquors is 'to promote temperance.' The evil to be remedied is the use of intoxicating liquors as a beverage."

See: Ex Parte Crane, 151 Pac. 1006; Lincoln *vs.* State, 27 Vt. 320 at 337; State *vs.* J. P. Bass Publishing Co., 104 Me. 288, 71 A. 894; State *vs.* Certain Intoxicating Liquors (Utah) 172 Pac. 1050; State *vs.* Giaudrone (Wash.) 186 Pac. 870; Fitch *vs.* State, (Neb.) 167 N. W. 417, 419; West Virginia *vs* Adams Express Co., (C. C. A., 4th Cir. Ct.), 219 Fed. 794; Trageser *vs.* Gray, 73 Md. 250, 20 Atl. 905; Crane *vs.* Campbell, 245 U. S. 304, 62 L. Ed. 304.

The courts not only consider the purpose of the statute but the nature of the evil to be remedied as well, as was said by Mr. Justice McReynolds in sustaining the prohibition statutes of Idaho in the case of Crane *vs.* Campbell, 245 U. S. 304, 62 L. Ed. 304:

> "It must now be regarded as settled that, on account of their well-known noxious qualities and the extraordinary evils shown by experience commonly to be consequent upon their use, a state has power absolutely to prohibit manufacture, gift, purchase, sale, or transportation of intoxicating liquors within its borders without violating the guaranties of the Fourteenth Amendment.
> * * *"

It was said by the Court of Errors and Appeals of New Jersey in the case of Paul *vs.* Gloucester, 50 N. L. Law 585, 15 Atl. 272, 1 L. R. A., 86:

> "The sale of intoxicating liquors has, from the earliest history of our state, been dealt with by legislation in an exceptional way. It is a subject by itself, to the treatment of which all the analogies of the law, appropriate to other topics, cannot be applied."

The Eighteenth Amendment represents the culmination of a half century struggle upon the part of the people of the United States in an attempt to reach a satisfactory solution of the problems arising from the use of intoxicating liquor as a beverage. The various steps of the progress of this movement are strikingly portrayed in the decisions of the United States Supreme Court from the decision in the case of Leisy *vs.* Hardin, 135 U. S. 100, 34 L. Ed. 128, wherein the court held that intoxicating liquors shipped into a state were protected under the commerce clause as long as they remained in the original package. This was met by the passage of what was known as the Wilson Law, which was sustained in *In Re* Rahrer, 140 U. S. 545. This in turn was followed by the passage of the Webb-Kenyon Act, removing the interstate commerce protection from intoxicating liquors introduced into a state in violation of the law of a state, sustained in the case of Clark Distilling Company *vs.* Western Maryland Railway Company, 242 U. S. 311.

So widespread had become the demand for legislation prohibiting the manufacture and sale of intoxicating liquors at the outbreak of the World War, that Congress, in the exercise of the power conferred by the Constitution to wage war, prohibited the manufacture and sale of intoxicating liquors as a war measure. This legislation was sustained in Hamilton *vs.* Kentucky Distilleries and Warehouse Company, 251 U. S. 146, and Ruppert *vs.*

Caffey, 251 U. S. 264. The application of the principle of prohibition on a national scale met with such general approval that Congress on December 18, 1917, submitted a resolution proposing the Eighteenth Amendment to the Constitution of the United States. This resolution required that it be ratified within seven years, if it was to become operative. The proposed amendment was so responsive to popular demand that by January 16, 1919, the Legislatures of the necessary three-fourths of the states had ratified it, and up to the present time the Legislatures of forty-six of the forty-eight states have ratified the amendment. This amendment was ratified ~~within a shorter period of time~~ than any amendment to the Constitution which had preceded it. To a peculiar degree it represents the popular demand of the people of the United States.

That it was the purpose of the people in incorporating this amendment in the Constitution to withdraw all sanction and protection of this government from beverage intoxicants without regard to whether they were to be used or consumed by citizens of this country is evidenced by the comprehensive language employed in the Amendment itself, for the amendment prohibits the *exportation of intoxicating liquors for beverage purposes*, although such liquors are not intended for use by the citizens of the United States. As this court in speaking of this feature of the Amendment aptly expressed it in the case of Grogan *vs.* Walker:

> "* * * It does not confine itself in any meticulous way to the use of intoxicants in this country. It forbade export for beverage purposes elsewhere. * * *"

Congress, in the exercise of the duty imposed upon it to enact appropriate legislation for its enforcement, has also framed legislation broad in its terms to give effect to the true intendment of the Amendment. Section 3 of the

Act lays down a broad prohibition by providing that "no person shall on or after the date when the Eighteenth Amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in the Act, and all of the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquors as a beverage may be prevented."

In the remaining sections of the Act exceptions are made for the procuring and use of intoxicating liquors for non-beverage purposes. There are no exceptions created in the statute with reference to vessels of the United States anywhere or as to foreign vessels within the territorial waters of the United States. *Where Congress in its legislative wisdom deemed an exception proper it made express provision for it.* A single instance of this is found in the case of transportation of liquor through the Panama Canal or on the Panama Railroad. But even in this excepted case the liquor is required to be in transit and it is expressly provided that there shall be no sale of such liquors for beverage purposes within the Canal Zone. These provisions of the statute clearly show that Congress recognized the nature of the evil to be remedied and withdrew the protection of this government, insofar as it was within its sovereign power, from all possession or transportation of intoxicating liquors coming within the jurisdiction of this country, irrespective of whether it was to be consumed by citizens of this country. This but followed the purpose of the Amendment in prohibiting exportation and this has been the construction given the Amendment and statute by this court in the case of Grogan *vs.* Walker, wherein the shipping interests contended that the transshipment of liquors through this country was not within the purview of the Amendment. The court said:

> "They did not want intoxicating liquor in the United States, and reasonably may have thought that if they let it in some of it was likely to stay."

Considering next the practical questions involved. According to enforcement officers one of the chief difficulties at present in law enforcement is the smuggling of liquors into the United States in the guise of ship stores or through other forms of subterfuge. The practical considerations involved in the construction of the statute apply as reasons for prohibiting the transportation, possession or furnishing of liquors upon foreign vessels within the territorial limits in the instant case, with even greater force than they did in the case of Grogan *vs.* Walker, and Anchor Line *vs.* Aldridge. In that case the question of the permission to transship liquors through this country involved to the people of the United States simply the danger that some of the liquor might be diverted in transit. There is involved in the instant case, the additional element of unjust discrimination against vessels of the United States if an exception be implied in the statute. (See Exhibit "A," p. 45.)

The Attorney General of the United States in an opinion rendered October 6, 1922, in reaffirming a ruling made by the former Attorney General, of November 1, 1920, held that the transportation or possession of intoxicating liquor upon vessles of the United States whether within or without the territorial waters of the United States was prohibited under the Eighteenth Amendment and National Prohibition Act. This view has also been sustained by the courts in the case of United States *vs.* 254 Bottles of Intoxicating Liquor; 281 Fed. 247 wherein the District Court for the Southern District of Texas held:

> "Possession of intoxicating liquors on the high seas by captain of a vessel owned and operated for the account of the United States Shipping Board Emergency Fleet Corporation was illegal, and they were subject to forfeiture under the National

Prohibition Act, Title II, sections 3, 6, 26; the ship being a part of the territory of the United States."

District Judge Learned Hand in passing upon these cases when they were before him, said in speaking of the purpose of the Eighteenth Amendment and National Prohibition Act:

> "* * * Effecting a revolutionary reform in the habits of the nation, the statute is to be understood as thoroughgoing in its intent to accomplish the results desired. It did not specify the extent of its application in detail, but left that to be gathered from its occasion, and the generality of the words used. It intended to exercise once for all the complete power of Congress under the amendment, and its very want of particularity, is a good index that it meant to cover what it could. * * * Indeed, specification in the statute might have defeated its ends, on the theory that what was omitted must be taken as excluded."

In the case of the application of the Eighteenth Amendment and National Prohibition Act to vessels of the United States on the high seas it is true that the National Prohibition Act does not in express terms extend its application to vessels upon the high seas, but these rulings are based upon the fact that this offense is created by the Constitution itself which not only lays the prohibition but defines the extent of its operation. There being no exception made with reference to vessels of the United States upon the high seas it naturally follows that the prohibition applies to them. In the instant cases there are no exceptions made in the statute authorizing the transportation, possession or furnishing intoxicating liquor by foreign vessels within the territorial waters of the United States. If the people of the United States did not intend that vessels of the United States should have the privilege of transporting or possessing intoxicating liquors it is unlikely that they would have discriminated

in favor of foreign nations as against vessels of the United States. The National Prohibition Act provides that it shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented. As between a construction which will prevent vessels transporting or possessing liquor for beverage purposes from entering the jurisdiction of the United States and one which will permit such entry there can be no doubt as to which construction better tends to prevent the use of beverage intoxicants. The courts in endeavoring to ascertain the intention of the legislative body will not only consider the language of the statute but the practical results flowing from such interpretation. The mere suggestion that the people of the United States intended to grant to foreign nations a privilege which they denied to their own citizens, carries its own refutation.

In considering the practical effect of a construction of the Act of Congress relating to American Seamen the Supreme Court of the United States in the case of Patterson *vs.* Eudora, 190 U. S. 168, 47 L. Ed. 1002 held the provisions of the statute to be equally applicable to foreign ships and said of the reasons which induced Congress to enact it:

> "Moreover, as ninety per cent of all commerce in our ports is conducted in foreign vessels, it must be obvious that their exemption from these shipping laws will go far to embarrass domestic vessels in obtaining their quota of seamen. To the average sailor it is a consideration while in port to have his wages in part prepaid, and if, in a large port like New York, ninety per cent of the vessels are permitted to prepay such seamen as ship upon them, and the other ten per cent being American vessels, cannot thus prepay, it will be exceedingly difficult for American vessels to obtain crews. This practical consideration, presumably, appealed to Congress and fully justified the provision herein contained."

The indisputable purpose of the people of the United States in adopting the Eighteenth Amendment and of Congress in passing the National Prohibition Act was to make its prohibition of uniform application within the limits of its jurisdiction; to discriminate against none and to treat all nations alike.

V. THE LANGUAGE OF THE STATUTE AS WELL AS THE DECISIONS OF THIS COURT INDICATE THAT IT IS TO BE GIVEN A LIBERAL RATHER THAN A RESTRICTED CONSTRUCTION TO EFFECT ITS PURPOSE.

Section 3, Title II of the National Prohibition Act provides:

> "All the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquors as a beverage may be prevented. * * *"

The uniform decisions of this court in construing the National Prohibition Act are to the effect that it is to be given a liberal rather than a restricted construction. This is evidenced by the decision in the case of Rhode Island *vs.* Palmer, 253 U. S. 350, 64 L. Ed. 946, wherein the provision defining intoxicating liquors to include beverages containing as much as one-half of one per cent of alcohol was sustained, although such might not be in fact intoxicating; see also Ruppert *vs.* Caffey, 251 U. S. 264, 64 L. Ed. 261, also sustaining the prohibition as applicable to liquors manufactured prior to the date the Act became effective and denying compensation to the owners thereof. Rhode Island *vs.* Palmer and Ruppert *vs.* Caffey, supra. Sustaining the application of the prohibition to liquors purchased prior to the date the act became effective and stored in bonded warehouses though intended solely for use of the owner in the home. Corneli *vs.* Moore, 66 L. Ed. —. Denying the contention of the British shippers that under the provisions of a treaty

they were entitled to transship liquors through this country in bond. Grogan *vs.* Walker, Anchor Line *vs.* Aldridge.

VI. VESSELS OF THE UNITED STATES ARE TERRITORY OF THE UNITED STATES. THE PROHIBITIONS OF THE EIGHTEENTH AMENDMENT APPLY TO THEM WHEREVER THEY ARE.

Vessels on the high seas occupy a position in law unlike that of any other species of property. This is shown by the following excerpts from Moore's International Law Digest, Volume 1, Page 930, wherein it is said:

> "It is often stated that a ship on the high seas constitutes a part of the territory of the nation whose flag it flies. In the physical sense, this phrase obviously is metaphorical. In the legal sense, it means that a ship on the high seas is subject to the exclusive jurisdiction of the nation to which, or to whose citizens, it belongs. The jurisdiction is quasi territorial."

For the purpose of the administration of law such merchant vessels are constructively considered a part of the territory of the nation to which they belong, both as regards the application of civil and criminal statutes. This is the view expressed by this court in the case of St. Clair *vs.* United States, 154 U. S. 134, 38 L. Ed. 936. This was a prosecution for murder under Section 5339 of the Revised Statutes of the United States providing for the punishment of "every person who commits murder upon the high seas * * * within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular state." The court held:

> "A vessel registered as a vessel of the United States is, in many respects, considered as a portion of its territory, and persons on board are protected and governed by the laws of the country to which the vessel belongs."

In the case of United States *vs.* Rodgers, 150 U. S. 249, 37 L. Ed. 1071, which was an indictment for murder committed on the Great Lakes, this court held that the term "high seas" included the unenclosed waters of the Great Lakes, and said:

> "A vessel is deemed a part of the territory of the country to which she belongs."

See also the case of Wynne *vs.* United States, 217 U. S. 240, 54 L. Ed. 748, wherein this court sustained a conviction for murder committed on board an American ship lying in the harbor at Honolulu. It was held there was nothing in the Hawaiian Organic Act of April 30, 1900, which expressly or impliedly deprived Federal courts of their jurisdiction to punish murder under the circumstances, when committed in a haven or arm of the sea within the admiralty jurisdiction of the United States and out of the jurisdiction of any particular state.

See also the case of Wiborg *vs.* United States, 163 U. S. 633, 41 L. Ed. 289, which was an indictment for embarking upon a military expedition prohibited by the United States Revised Statutes, Section 5286. The indictment was sustained where the evidence showed that the parties in pursuance of an agreement were taken by a tug thirty or forty miles out to sea to a steamer on which they embarked, whereon they drilled in preparation for participation in the Revolution in Cuba. The majority of the court sustained the conviction notwithstanding the dissenting opinion of Mr. Justice Harlan in which he held that the defendant could not have been said to have done any act within the territorial jurisdiction of the United States within the contemplation of the statute. It will be observed that the overt acts in this case were committed on the high seas.

See also the case of Miller *vs.* United States, 242 Fed. 907, sustained by this court in 62 L. Ed. 535. The case

of a conviction for the unlawful theft of fish on the high seas.

See the case of Daeche *vs.* United States, 250 Fed. 566, the Circuit Court of Appeals for the Second Circuit held:

> "In a prosecution under Cr. Code, Section 37 (Comp. St. 1916, Section 10201), denouncing conspiracies to commit any offense against the United States, and Section 298 (Comp. St. 1916, Section 10471), denouncing the offense of attacking any vessel belonging to another with intent to unlawfully plunder the same or despoil any owner thereof of any goods, etc., where defendants to aid Germany conspired to attach to munition bearing ships while in the waters of the United States infernal machines which would explode while they were *on the high seas*, the offense must be deemed to have been committed within the United States, which was the place where the last conscious act of the wrongdoers was performed." (Italics ours.)

See also Pedersen, et al., *vs.* United States, 271 Fed. 187.

Mr. Justice Field, in United States *vs.* Smiley, 6 Sawyer 640, 645, stated the rule of law determining the territory subject to the criminal jurisdiction of the United States as follows:

> "Their actual territory is co-extensive with their possessions, including a marine league from their shores into the sea. * * * The constructive territory of the United States embraces vessels sailing under their flag; wherever they go they carry the laws of their country, and for a violation of them their officers and men may be subject to punishment."

Our diplomatic correspondence and the opinions of the courts have uniformly considered that insofar as the restraining and protecting jurisdiction of our government is concerned, American ships whether owned by the government or by private citizens or corporations are in many respects territory of the United States, both for

purposes of civil and criminal jurisdiction; the Scotia, 14 Wall. 170, 184; Crapo *vs.* Kelly, 16 Wall. 610; Lindstrom *vs.* International Navigation Company, 117 Fed. 170; Mr. Blaine, Secretary of State, to Mr. Ryan, Minister to Mexico, Nov. 27, 1889, (Moore's Int. Law Digest, vol. I, page 931; Mr. Webster, Secretary of State, to Lord Ashburton, August, 1842 cited in Rogers *vs.* United States, 150 U. S. 247; St. Clair *vs.* United States, 154 U. S. 134, 152; United States *vs.* Smiley, 6 Sawy. 640, 645; Wilson *vs.* McNamee, 102 U. S. 572; Manchester *vs.* Mass., 139 U. S. 240; For purposes of taxation, People *vs.* Com. of Taxation, 58 N. Y. 2421; Olsen *vs.* San Francisco, 82, Pac. 850; Pilotage Laws; Wilson *vs.* McNamee, 102 U. S. 572; Laws concerning assignment, Crapo *vs.* Kelly, 16 Wall. 610; Manchester *vs.* Mass., 139 U. S. 240; Old Dominion Steamship Company *vs.* Gilmore, 206 U. S. 402, 403; For purpose of extradition; Moore on Extradition, vol. I, page 135, section 104; Vogt 14 Op. Att. Gen., 281; Wharton's State Trials, pages 392, 403, 404; Seale's Cases on Conflict of Laws, Section 22, page 506.

VII. MERCHANT VESSELS OF ONE SOVEREIGN ENTERING THE PORTS OF ANOTHER SUBJECT THEMSELVES TO THE LAW OF THE PORT OF ENTRY. REQUIRING FOREIGN VESSELS ENTERING OUR PORTS SEEKING OUR TRADE TO COMPLY WITH OUR LAWS VIOLATES NO RULE OF INTERNATIONAL LAW.

The people of the United States and Congress are possessed of full authority to enact this legislation. It is based upon the fundamental right of a sovereign to enforce its laws. Every sovereign nation has the inherent right to admit or refuse entrance to vessels belonging to another nation as it may see fit, and may impose such conditions upon their entrance as in its legislative wisdom may be necessary.

The construction of the statute, herein contended for, involves no unjust discrimination in violation of treaty rights. It treats all nations alike. It affords to natives of foreign nations the same protection as to natives of this country. This is all that they may demand under any law, international, municipal or moral. The construction operates uniformly upon the citizens of all nations. Authorities for this principle are as follows:

EACH FULLY SOVEREIGN STATE HAS EXCLUSIVE JURISDICTION OVER ITS OWN TERRITORY AND WITHIN THAT TERRITORY THE STATE IS ABSOLUTE. 22 Cyc. International Law, page 1718. Chief Justice Marshall in the early case of The Schooner Exchange *vs.* McFadden, et al., 7 Cranch, 114; 3 L. Ed. page 287, laid down the law upon the subject as follows:

> "The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.
>
> "All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source."

MERCHANT VESSELS OF ONE SOVEREIGN ENTERING THE PORTS OF ANOTHER SUBJECT THEMSELVES TO THE LAWS OF THE PORT OF ENTRY. This principle was also laid down by Chief Justice Marshall in the case of The Schooner Exchange *vs.* McFadden et al., 7 Cranch, 144, 3 L. Ed. 296, as follows:

> "When private individuals of one nation spread themselves through another as business or caprice may direct, mingling indiscriminately with the

> inhabitants of that other, or when merchant vessels enter for the purpose of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such individuals or merchants did not owe temporary and local allegiance and were not amenable to the jurisdiction of the country. Nor can the foreign sovereign have any motive for wishing such exemption. His subjects thus passing into foreign countries, are not employed by him, nor are they engaged in national pursuits. Consequently there are powerful motives for not exempting persons of this description from the jurisdiction of the country in which they are found, and no one motive for requiring it. The implied license, therefore, under which they enter can never be construed to grant such exemption."

This enunciation by Chief Justice Marshall has been repeatedly followed by this court and has become a well established principle of our jurisprudence. In the case of Patterson *vs.* Eudora, 190 U. S. 168, 47 L. Ed. 1007, in speaking of the Act relating to American Seamen, the court said:

> "* * * *Yet when a foreign merchant vessel comes into our ports, like a foreign citizen coming into our territory, it subjects itself to the jurisdiction of this country.*" (Italics ours.)

In the case of United States *vs.* Diekelman, 92 U. S. 520, 23 L. Ed. 742, this court said:

> "Merchant vessels of one country, visiting the ports of another, for the purpose of trade, subject themselves to the laws which govern the ports so visited, so long as they remain; and this as well in war as in peace, unless otherwise provided by treaty."

See also Mali *vs.* Keeper of Common Jail, 120 U. S. 1, 30 L. Ed. 565. This view is also sustained by text

writers on International Law and by diplomatic Correspondence of nations. Moore's International Law Digest, Volume 2, Section 204, page 272, 273.

THERE ARE INNUMERABLE INSTANCES OF THE EXERCISE OF THIS INHERENT POWER OF A SOVEREIGN TO PROHIBIT BOTH UNDESIRABLE PERSONS AND PROPERTY FROM ENTERING WITHIN ITS TERRITORIAL LIMITS AND SUSTAINING THE AUTHORITY TO PROVIDE THE CONDITIONS UPON WHICH SUCH ENTRANCE MAY BE MADE. Illustrations of this principle, as it applies to persons, will be found in the Chinese Exclusion Act in the case of Nishimura Ekiu *vs.* United States, 142 U. S. 659, 35 L. Ed. 1146 in which this court said:

> "It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. Vattel, lib. 2 sections 94, 100; 1 Phillimore (3rd ed.) chap. 10, section 220. In the United States this power is vested in the national government, to which the Constitution has committed the entire control of international relations, in peace as well as in war. It belongs to the political department of the government, and may be exercised either through treaties made by the President and Senate, or through statutes enacted by Congress, upon whom the constitution has conferred power to regulate commerce with foreign nations, including the entrance of ships, the importation of goods and the bringing of persons into the ports of the United States; to establish a uniform rule of naturalization; to declare war; and to provide and maintain armies and navies; and to make all laws which may be necessary and proper for carrying into effect these powers and all other powers

vested by the Constitution in the government of the United States or in any department or officer thereof. U. S. Const. art. 1, section 8; Head Money Cases, 112 U. S. 580 (28:798); Chae Chan Ping *vs.* United States, 130 U. S. 581, 604–609 (32: 1068, 1075, 1076)."

EXCLUSION AND DEPORTATION OF ANARCHISTS. United States *vs.* Williams, 194 U. S. 278, 48 L. Ed. 979; PROHIBITING THE IMPORTATION OF SPONGES. Abby Dodge *vs.* United States, 223 U. S. 172, 56 L. Ed. 390; PROHIBITING THE IMPORTATION OF TEA. Buttfield *vs.* Stranahan, 192 U. S. 468, 48 L. Ed. 525; OPIUM—PUNISHMENT FOR THE RECEIPT, CONCEALMENT OR TRANSPORTATION OF OPIUM IMPORTED IN VIOLATION OF THE ACT OF CONGRESS. In the case of Brolan *vs.* United States, 236 U. S. 216, 59 L. Ed. 544, this Court sustained the Act of Congress of February 9, 1909, 35 Statutes at Large, 614, Chap. 100. Mr. Chief Justice White said:

> "It is not to be doubted that from the beginning Congress has exercised a plenary power in respect to the exclusion of merchandise brought from foreign countries; not alone directly by the enactment of embargo statutes, but indirectly, as a necessary result of provisions contained in tariff legislation, it has also in other than tariff legislation, exerted a police power over foreign commerce by provisions which, in and of themselves, amounted to the assertion of the right to exclude merchandise at discretion. This is illustrated by statutory provisions which have been in force for more than fifty years, regulating the degree of strength of drugs, medicines, and chemicals entitled to admission into the United States, and excluding such as did not equal the standards adopted. 9 Statutes at L. 237, Chapter 70, Rev. Stat. section 2933, Comp. Stat. 1913, section 5622. And see Oceanic Steam. Nav. Co. *vs.* Stranahan, 214 U. S. 320, 334,

335, 53 L. Ed. 1013, 1020, 29 Sup. Ct. Rep. 671; The Abby Dodge, 223 U. S. 166, 176, 56 L. Ed. 390, 393, 32 Sup. Ct. Rep. 310."

If Congress in the exercise of its power under the Constitution to regulate commerce with foreign nations was authorized to prohibit the importation of such innocuous commodities as tea and sponges there can be no question of its authority in the exercise of its powers to prohibit the importation or transportation of intoxicating liquors, under the Eighteenth Amendment.

GREAT BRITAIN—The British Parliament has repeatedly exercised this right. See the Act prohibiting the importation of foreign prison made goods. Act of 1897, 60, 61 Vict., Chapter 63, Section 2. Also other illustrations will be found in Section 42 of the Consolidated Customs Act of 1876 as amended, 39, 40 Vict. Chapter 36, Section 42.

LEGISLATIVE CONDITIONS FOR ENTRANCE INTO PORTS MAY BE MADE TO APPLY EQUALLY TO BOTH DOMESTIC AND FOREIGN SHIPS AND IN CERTAIN INSTANCES NATIONS HAVE IMPOSED CONDITIONS PRECEDENT AS A PREREQUISITE TO ENTRANCE INTO ITS PORTS THOUGH THE ACT REQUIRED TO BE PERFORMED OR OMITTED IS TO BE DONE BEYOND ITS TERRITORIAL LIMITS. In the case of Abby Dodge v. United States, 223 U. S. 172, 56 L. Ed. 390, this court passed upon the Act of June 20, 1906, 34 Stat. at Large, 313, making it unlawful to land, deliver, cure or offer for sale at any port or place in the United States, any sponges taken by means of diving or diving apparatus from the waters of the Gulf of Mexico or Straits of Florida. The exact language of the first section of this act is as follows:

"That from and after May first, Anno Domini nineteen hundred and seven, it shall be unlawful

> to land, deliver, cure, or offer for sale at any port or place in the United States, any sponges taken by means of diving or diving apparatus from the waters of the Gulf of Mexico or Straits of Florida; Provided, That sponges taken or gathered by such process between October first and May first of each year in a greater depth of water than fifty feet shall not be subject to the provisions of this act: And, provided further, That no sponges taken from said waters shall be landed, delivered, cured, or offered for sale at any port or place in the United States of a smaller size than four inches in diameter."

It was contended that this act was invalid for two reasons, first, that it attempted to regulate sponges taken within territory which might be within the jurisdiction of the states and was therefore beyond the authority of Congress to enact; and second, that if it be construed to apply only to sponges taken beyond the jurisdiction of the state it would then deal with sponges taken in the open sea and beyond the jurisdiction of the national government. The court sustained the first proposition, namely, that Congress had no power to legislate with reference to sponges taken within the jurisdiction of the state but held that in view of the well known distinction between the powers of the Federal and State governments it would not be so construed but would be held to apply to sponges taken in mid-ocean, and pointed out that its penalties were equally applicable to foreign as well as American ships. The court said:

> "Undoubtedly (Lord & Goodall, N. & P. S. Co., 102 U. S. 541, 26 L. Ed. 224), whether the Abby Dodge was a vessel of the United States or of a foreign nation, even *although it be conceded that she was solely engaged in taking or gathering sponges in the waters which, by law of nations, would be regarded as the common property of all*, and was transporting the sponges so gathered to the United

States, the vessel was engaged in foreign commerce, and was therefore amenable to the regulating power of Congress over that subject. This being not open to discussion, the want of merit of the contention is shown, since the practices from the beginning, sanctioned by the decisions of this court, establish that Congress, by an exertion of its power to regulate foreign commerce, *has the authority to forbid merchandise carried in such commerce from entering the United States.*" (Italics ours.)

The court dismissed the libel in the case because it failed to negative the fact that the sponges may have been taken from waters within the territorial limits of the state, but the court was careful to point out the right of Congress to legislate with reference to sponges taken in the open sea when attempted to be brought into the United States, for the court said:

> "In view of the paramount authority of Congress over foreign commerce, *through abundance of precaution we say that nothing in this opinion implies a want of power in Congress*, when exerting its absolute authority to prohibit the bringing of merchandise, the subject of such commerce into the United States, to cast upon one seeking to bring in the merchandise, the burden, if an exemption from the operation of the statute is claimed, of establishing a right to the exemption." (Italics ours.)

ACT OF UNITED STATES CONGRESS KNOWN AS THE HARTER ACT. By Section 1 of the Act of Congress of February 13, 1893, 27 Stat. at L. 445, it was declared to be unlawful for the representative or owner of any vessel transporting merchandise from or between ports of the United States and foreign ports to insert in any bill of lading any clause for relief from liability for damages arising from negligence from the proper loading, storage, custody, care or delivery of property so transported. In 1900 this court in the case of Knott Botany Worsted Mills

179 U. S. 68, 45 L. Ed. 90 held that this Act of Congress overroad and nullified any stipulation concerning limited liability on a contract for carriage. The facts in this case were: A British vessel, the "Portuguese Prince," belonging to a line trading between New York, Brazil and the West Indies, undertook the transportation of certain bales of wool from Buenos Aires. The bill of lading exempted the carrier from liability for certain forms of negligence. This court said:

> "The remaining question is whether the first section of the Harter Act applies to a foreign vessel on a voyage from a foreign port to a port in the United States. *The power of Congress to include such cases in this enactment cannot be denied in a court of the United States.* The point in the controversy is whether, upon the proper construction of the act, Congress has done so. That the third section does extend to such a vessel on such a voyage has been already decided by this court." (Italics ours.)

The Sylvia, 171 U. S. 462, 43 L. Ed. 241, 243; The Chattahoochi, 173 U. S. 540, 43 L. Ed. 801, 806.

LIMITED LIABILITY ACT OF 1851. The Act of Congress of March 3, 1851, 9 Statutes at Large, 635, reproduced in sections 4282 and 4289 of Revised Statutes provided for limited liability upon the owners of vessels for losses arising from certain causes. In the case of the National Steam Navigation Company *vs.* Dyer, 15 Otto 24, 26 L. Ed. 1001, this court said:

> "The Limited Liability Act of 1851 reproduced in the Revised Statutes in section 4282, etc., applies to owners of foreign as well as domestic vessels; and to acts done on the high seas as well as in the waters of the United States, except when a collision occurs between two vessels of the same foreign nation, or perhaps of two foreign nations having the same maritime law."

THE PLIMSOLL ACT OF GREAT BRITAIN. See Volume 2, Moore's International Law Digest, 282.

It is a well recognized principle of both criminal and international law that penal laws of a sovereign have no extra territorial jurisdiction, but in many instances, however, nations have provided conditions precedent for the entrance of vessels into their ports and imposed penalties for violation thereof, though the condition to be performed or omitted was to take place beyond the territorial limits of such nation.

GREAT BRITAIN. In the case of The Annopolis *vs.* Johanna Stoll, (1861) Lush. 295, the High Court of Admiralty held:

> "The British legislature has no authority over foreign vessels on the high seas out of British jurisdiction, *but may impose any conditions on foreign vessels entering a British port,* and consequently an obligation on foreign ships inward bound to take a pilot at an convenient station *beyond the three mile limit is valid.*"

UNITED STATES. This was the precise question presented in the case of Abby Dodge *vs.* United States, 223 U. S. 172, 56 L. Ed. 390, wherein this court sustained the act of Congress making it unlawful to land, deliver, cure or offer for sale at any port or place in the United States any sponges taken by means of diving or diving apparatus from the waters of the Gulf of Mexico or Straits of Florida, although it applied to acts done beyond the territorial waters of the United States and to foreign vessels as well as vessels of the United States.

The Eighteenth Amendment and National Prohibition Act do not apply to the conduct of foreign vessels outside of the territorial waters of the United States. The foregoing cases are merely cited as illustrations of the plenary power possessed and exercised by nations in the execution of domestic policies.

THERE IS NO VESTED RIGHT IN ANY INDIVIDUAL TO TRADE WITH FOREIGN NATIONS WHICH PRECLUDES CONGRESS IN THE EXERCISE OF ITS PLENARY POWER TO REGULATE FOREIGN COMMERCE TO EXCLUDE COMMODITIES FROM ENTRY INTO THIS COUNTRY. This was fully established by this court in the case of Buttfield *vs.* Stranahan, 192 U. S. 468, 48 L. Ed. 525. In this case the court sustained the validity of the Tea Inspection Act of March 2, 1897, 29 Statutes at Large, 604, which forbade the importation of teas of a quality inferior to the government standard. This act authorized the destruction of any tea which was not removed within six months after their inspection by the inspector of teas.

VIII. THE DECISION OF THIS COURT IN THE CASES OF GROGAN *vs.* WALKER AND ANCHOR LINE *vs.* ALDRIDGE IS CONCLUSIVE OF THESE CASES.

Every argument which has been urged in these cases was passed upon by this court in those cases, and fully considered, as is evidenced by the opinion of the court.

In one of those cases certain foreign vessels claimed the right to remove liquors from one foreign vessel in New York harbor to another, for shipment to a foreign port under customs bond, and claimed exemption from the operation of the statute by virtue of Section 3005 of the Revised Statutes and a treaty. The liquor was not to remain in this country. It was to be under customs bond while in transit in this country. It was claimed that it was neither importation nor exportation from this country. It was like the liquor which formerly was sealed and locked as a part of the ship's stores when it came into the harbors of the United States.

After considering fully the former status of the law and Section 3005 of the Revised Statutes, which formerly per-

mitted such shipments, and Article 29 of the treaty concluded with Great Britain the court said:

> "In view of the parallelism between the statute and the treaty the question seems of no importance except so far as the existence of the treaty might be supposed to intensify the reasons for construing later legislation as not overruling it. But makeweights of that sort are not enough to affect the result here.
>
> "On the other side is the Eighteenth Amendment forbidding 'the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territories subject to the jurisdiction thereof for beverage purposes.' There is also the National Prohibition Act of October 28, 1919, ch. 85, Title II, Section 3, 41 Stat. 305, 308, which provides that except as therein authorized, after the Eighteenth Amendment goes into effect no person shall manufacture, sell, barter, *transport*, import, export, deliver, furnish or *possess* any intoxicating liquor. All the provisions of the act are to be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented. (Italics ours.)
>
> "The routine arguments are pressed that this country does not undertake to regulate the habits of people elsewhere and that the references to beverage purposes and use as a beverage show that it was not attempting to do so; that it has no interest in meddling with the transportation across its territory if leakage in transit is prevented, as it has been; that the repeal of statutes and *a fortiori* of treaties by implication is not to be favored; and that even if the letter of a law seems to have that effect a thing may be within the letter yet not within the law when it has been construed. WE APPRECIATE ALL THIS, BUT ARE OF OPINION THAT THE LETTER IS TOO STRONG IN THIS CASE. (Capitals ours.)
>
> "The Eighteenth Amendment meant a great revolution in the policy of this country, and pre-

sumably and obviously meant to upset a good many things on as well as off the statute books. It did not confine itself in any meticulous way to the use of intoxicants in this country. It forbade export for beverage purposes elsewhere. True, this discouraged production here, but that was forbidden already, and the provision applied to liquors already lawfully made. See Hamilton *vs.* Kentucky Distilleries & Warehouse Co., 251 U. S. 126, 151, n. 1. It is obvious that those whose wishes and opinions were embodied in the Amendment meant to stop the whole business. They did not want intoxicating liquor in the United States and reasonably may have thought that if they let it in some of it was likely to stay. When, therefore, the Amendment forbids not only importation into and exportation from the United States, but transportation within it, the natural meaning of the words expresses an altogether probable intent. The Prohibition Act only fortifies in this respect the interpretation of the Amendment itself. The manufacture, possession, sale and transportation of spirits and wine for other than beverage purposes are provided for in the act, but there is no provision for transshipment or carriage across the country from without. When Congress was ready to permit such a transit for special reasons, in the Canal Zone, it permitted it in express words. Title III, Section 20; 41 Stat. 322."

It follows clearly, therefore, from this decision that the possession, transportation or furnishing of beverage intoxicants are prohibited within the territorial limits of the United States because of the provision in Section 3 and there is no exemption or exception to it. This conclusion is made more definite and certain when we read the dissenting opinion of Mr. Justice McKenna.

IX. THE CONSTRUCTION SOUGHT BY THE FOREIGN SHIPPING INTERESTS IN THIS CASE SEEKS TO IMPOSE A LIMITATION UPON THE

SOVEREIGNTY OF THE UNITED STATES BY IMPLICATION. LIMITATIONS UPON SOVEREIGNTY ARE NOT FAVORED BY THE COURTS AND ARISE ONLY WHERE THE LANGUAGE OF THE LEGISLATIVE BODY IS EXPLICIT.

In the consideration of these cases the character of the complainants and the nature of the privilege sought must not be overlooked. The complainants are foreign shipping interests seeking a special privilege in the matter of trade with the United States. The construction which is sought seeks to impose a limitation upon the sovereignty of the United States. They rely simply upon custom and existing practice. The right of the United States to determine upon what conditions foreign vessels seeking our trade can enter our ports cannot be gainsaid. There is no principle of international law involved. Even before the Eighteenth Amendment was adopted Congress possessed the power under the authority conferred by the Constitution to regulate commerce with foreign nations and to prohibit vessels of foreign nations entering the ports of the United States whenever it saw fit. This right was exercised repeatedly without the infringement of any principle of international law.

In the light of these facts the slight basis upon which the privilege now being sought is based, becomes manifest. In Moore's International Law Digest, Volume II, Page 18, he discusses the rule of construction in such cases:

> "If, therefore, a dispute occurs between a territorial sovereign and a foreign power as to the extent or nature of rights enjoyed by the latter within the territory of the former, the presumption is against the foreign state, and upon it the burden lies of proving its claim beyond doubt or question."

It is insisted by the foreign steamship companies that an implied exception must be made in the statute

insofar as liquors commonly designated as sea stores, intended entirely for the subsistence of the passengers and crew, are concerned. It is contended that as to this class of beverage liquors that they occupy a position somewhat like that of the furniture or other appurtenances of the ship, and are necessary for its operation; that the customs laws of the United States expressly recognize these sea stores and that the transportation of such sea stores aboard foreign vessels while within the territorial waters of the United States is not a transportation within the meaning of that term as employed in the Eighteenth Amendment and National Prohibition Act.

A sovereign nation may prohibit the entry of foreign vessels within its ports entirely, if such a step should be considered necessary in the administration of its governmental policy. Nations may, and do, legislate concerning the character of the equipment or the furnishings of vessels entering their ports. There are many illustrations of this found in statutes regulating the equipment necessary for the safeguarding of human life; statutes regulating the manner of loading of vessels and sanitary laws enacted for the protection of the public health.

The sections of the Revised Statutes of the United States dealing with sea stores, R. S. 2795, 2796, 2797, 3111, 3112 and 3113, indicate merely that these statutes were enacted for the effective collection of the customs duties imposed by the statutes of the United States. Section 2795 in this connection reads: "In order to ascertain what articles ought to be exempt from duty, as the sea stores of a vessel, the Master shall particularly specify the articles."

District Judge Learned Hand, in speaking of this question, said:

> "Assuming that the customs laws give a positive right to enter ship's stores into the United States, a position in itself very doubtful since in form it

only exempted them from customs duties, at least it must be conceded that the statute, old as it is, represented only the *policy*, and not the *promise of the nation*. It is true that the custom in maritime affairs is of long standing to treat such stores as a part of the ship, but balancing that consideration with the implication against the repeal of a treaty, I cannot help believing that the second is the more weighty. At best it can only be said that the cases are on a parity in this regard." (Italics ours.)

Judge Hand then pointed out the reasons given by this court in its decision in the case of Grogan *vs.* Walker and Anchor Line *vs.* Aldridge. He said:

"In the decisions cited there was no conceivable danger in the transit of liquor across the United States except the chance of its escape. It is true that as suggested in Grogan *vs.* Walker, supra, the provision against export may have been intended to prevent the use of stimulants outside the United States, and, so far as it was, the argument applies with stronger force to the cases at bar. But taken substantially, the only evil which the transit could accomplish was that some of the liquor should not complete its passage. In the cases at bar the danger of an escape is equally present, not perhaps in the case of these plaintiffs, but I cannot regard them alone. Less responsible owners may not be as scrupulous, and the law runs for all.

"Naturally I have nothing to say about the wisdom of the amendment or the law, but wise or not, one thing is clear, that a drink of whisky is as hurtful to health and morals outside as inside Ambrose Light. It appears to me inconceivable, when one is discussing the implied intent of Congress, that a statute cast in such sweeping terms should be read as indifferent to open preparations within the United States for the gratification by its citizens of exactly those appetites which it was the avowed intent of the statute altogether to deny. Nor do I believe that any who would hesitate to think so who did not already repudiate the whole

reform. If, for example, we were to substitute cocaine or opium for alcohol, I can scarcely think there could be any disinterested difference of opinion.

"Suppose it were the habit of Chinese vessels to bring to our ports among their stores a proper supply of morphine and opium with the avowed purpose of dispensing it freely to passengers from the United States as soon as they cleared the league limit. Could it be seriously argued that a constitutional amendment and a statute in broad language designed to prevent citizens from using this drug did not cover so palpable a means of nullifying the very purpose of the law? The illustration is extreme only to those who can see no parity between the evils of opium and alcohol. But a Judge cannot take any position on that question; it must be enough for him that each is forbidden."

Judge Hand then pointed out that although in the argument of the cases before him no distinction was made between such portions of the sea stores as were intended for the consumption of passengers and that intended as rations for the crew, he points out the distinction, but states that both are equally within the purpose of the amendment and the statute. He says:

"It is indeed different with so much of the stocks as are kept for the crews, and a much stronger argument can be made for the legality of their carriage, though these also seem to me to fall within the decision I have so often cited. However, that question is really irrelevant as these cases are presented. The plaintiffs base their argument on the improbability that a statute in such general words should have meant to cover sea stores. This in turn rests upon the unliklihood that what has been for so long treated as not subject to municipal law should all at once become so. But the argument breaks down as soon as it appears that the stores as a whole cannot fairly be excluded.

> To say that the section covered some of such stores, but not all, would be to admit that as such they were not excluded by implication. What then becomes of the argument? There are indeed cogent reasons why these might be expected, but these are not because they are ship's stores.
>
> "Congress may indeed determine to make an exception in their favor, as to the validity of which I have nothing to say, but I do not think that a judge can imply the exception because of the unquestioned difficulties in which its absence leaves the plaintiffs. There is a narrow limit to judicial redrafting of statutes. Indeed, the argument was not suggested at the bar that passengers' refreshment and crews' rations stood in different positions. Probably none was intended, and I mention it only against the possibility that it might be taken later."

The position of the foreign steamship companies in the case of Grogan *vs.* Walker and Anchor Line *vs.* Aldridge was immeasurably stronger than their position in the instant cases. In those cases they relied upon the provision of an existing treaty and the language of Section 3005 of the Revised Statutes of the United States permitting transshipment of merchandise through this country. In those cases this court held that notwithstanding treaty provisions and the language of the statute, the privilege sought by the foreign shippers could not be implied in the face of the altered national policy of this government, manifested in the Eighteenth Amendment to the Constitution. This court said:

> "In view of the parallelism between the statute and the treaty the question seems of no importance except so far as the existence of the treaty might be supposed to intensify the reasons for construing later legislation as not overruling it. But makeweights of that sort are not enough to affect the result here."

In the present cases, sole reliance is placed upon the existing custom. There is no distinction made in the customs statutes of the United States between such portions of sea stores as are intended for consumption by passengers and that portion intended as rations for the crew. Such a distinction is wholly unjustifiable. In the face of the sweeping language of the Amendment and the statute, a right predicated merely upon custom and usage cannot prevail in the face of the changed policy expressed in the fundamental law of the United States.

The cases decided by this court, cited by counsel for the foreign ship owners, such as Gloucester Ferry Company *vs.* Pa., 114 U. S. 196; Rhodes *vs.* Iowa, 170 U. S. 412; Louisville & Nashville Railroad *vs.* Cook Brewing Company, 223 U. S. 70; Danciger *vs.* Cooley, 248 U. S. 31, to the effect that the transportation of such liquor as sea stores within the territorial waters of the United States is not a transportation within the meaning of the Amendment and statute are not controlling in this case. Those cases all involved the question of the validity of state legislation effecting interstate commerce. They are based upon the peculiar relation existing in this country, under our form of government, between the states and the federal government. Legislation by the states, insofar as it effects interstate commerce, is, under the Constitution, subordinate to the superior authority of Congress in the exercise of its power under the commerce clause. The Eighteenth Amendment is an exercise of sovereign power by the people of the United States and is subject to no superior authority. Furthermore, under this statute it is not only the transportation which is prohibited, but also the possession or furnishing of such liquors within territory subject to the United States which is unlawful.

CONCLUSION

In conclusion the following may be said concerning both of the legal questions involved in this controversy. The construction contended for by the shipping interests, both as to vessels of the United States on the high seas and vessels of foreign nations within the territorial waters of the United States, involves an implied exemption. This would have to be made in the face of the literal language of the amendment and the statute as well as contrary to their spirit, and is predicated entirely upon the argument of convenience of trade and the existing customs.

It is contended by counsel for the shippers that the question of comity of nations is seriously involved in the issue under discussion and that to construe the Federal Prohibition legislation as prohibiting all transportation within the territorial limits of the country would involve the United States in serious trade controversies. It is submitted that there is a far more serious question involved than mere matters of comity and trade. It is the question of whether there shall be enforced in the United States the laws of the United States or whether there is to be substituted for the will of the nation that of foreign powers. In view of the source of this legislation which is the will of the people expressed in an amendment to the Constitution, it would be contrary to American traditions, inconsistent with all precedents of treaty, constitutional and statutory interpretation to *read into the law by implication an exception not expressly contained therein and one tending to defeat its purpose,* merely upon the grounds of inconvenience of trade.

The shipping interests have urged as one of the reasons for seeking this exemption, the fact that the laws of certain foreign nations require that the immigrants and members of their crew be furnished wines and that it is impossible to compete in trade unless vessels of the United States have the same privileges. If foreign nations, in pursuance of their domestic policies can require vessels

entering their ports, seeking their trade, to comply with their domestic laws, certainly the United States is no less sovereign than any one of these nations. Shall the express will of the people of the United States embodied in an amendment to their fundamental law be declared subordinate to the will of any other people? That is the issue in this controversy. The construction which is sought involves a confession of weakness and a limitation upon the sovereign right of the people of the United States inconsistent with all of her past traditions; and incompatible with their honesty of purpose; whereas the construction which is urged herein asserts the right of a sovereign people to enforce their fundamental law and imposes upon foreign nations no duty of observance inconsistent with any principle of international law. It will treat all nations alike. This is but an elementary principle of simple justice. By this, vessels of the United States on the high seas, which claim the protection of the stars and stripes are but required to observe the Constitution of the United States, from which the flag derives its significance and power, and foreign nations made to observe a governmental policy flowing not simply from a legislative enactment but from the source of all power—the will of the people.

For these reasons, as well as the fact that Congress has consistently refused to enact legislation to permit the sale of intoxicating liquors on vessels of the United States upon the high seas although insistently besought to do so (see H. R. 11579 of the 66th Congress and hearing on the same, Serial 26, January 13, 1921, before the House Judiciary Committee of the 67th Congress), it is respectfully submitted that the decision of the District Court for the Southern District of New York in these cases should be affirmed.

Respectfully submitted,

ANDREW WILSON,
WAYNE B. WHEELER,
Attorneys, Amici Curiae.

EXHIBIT (A)

UNITED STATES LINES
45 Broadway
New York
Moore & McCormack Co., Inc. } Managing
Roosevelt Steamship Co., Inc. } Operators

December 9, 1922.

A. D. Lasker, Esq., Chairman,
United States Shipping Board,
Washington, D. C.

Dear Mr. Lasker:

The Freight and Passenger Agents with whom we do business are giving us the "merry laugh" this morning.

Whenever we have dinners or luncheons on board our steamers for Passenger and Freight Agents (and we must have them throughout the year, because the other lines do the same thing, and it is necessary for us to keep them as our friends), we serve a fine buffet luncheon or a good dinner, with soft drinks, cigars, etc., but no cocktails, wines, or beer.

These Agents attended a buffet luncheon on board the S. S. FORT VICTORIA yesterday noon, at Pier 95 North River, at which they were freely served cocktails, wines and beer. As a matter of fact the luncheon itself did not amount to anything, and most of those present practically construed the invitation as one to "come up and have a drink"—of which they all availed.

If we are to be up against this kind of competition, because of the failure of the Treasury and Prohibition Officers to enforce prohibition on foreign steamers as it is enforced on American steamers, it can have only one result, and the foreign lines will be carrying all of the freight

and passenger traffic of the United States, because the agents will be working for them instead of for American lines.

Very truly yours,

T. H. ROSSBOTTOM,
General Manager.

THR/G

INDEX.

CITATIONS.

Cases:

In the Supreme Court of the United States.

OCTOBER TERM, 1922.

THE CUNARD STEAMSHIP COMPANY, LTD., and Anchor Line (Henderson Brothers), Ltd., appellants, *v.* ANDREW W. MELLON ET AL.	No. 659.
OCEANIC STEAM NAVIGATION COMPANY, Ltd., appellants, *v.* ANDREW W. MELLON ET AL.	No. 660.
INTERNATIONAL NAVIGATION COMPANY, Ltd., appellants, *v.* ANDREW W. MELLON ET AL.	No. 661.
COMPAGNIE GENERALE TRANSATLANTIQUE, appellants, *v.* ANDREW W. MELLON ET AL.	No. 662.
THE NETHERLANDS AMERICAN STEAM Navigation Company (Holland American Line), appellants, *v.* ANDREW W. MELLON ET AL.	No. 666.
LIVERPOOL, BRAZIL AND RIVER PLATE Steam Navigation Company, Ltd., appellants, *v.* ANDREW W. MELLON ET AL.	No. 667.
THE ROYAL MAIL STEAM PACKET COMPANY, appellants, *v.* ANDREW W. MELLON ET AL.	No. 668.

UNITED STEAMSHIP COMPANY OF COPENHAGEN (Scandinavian American Line), appellants, *v.* ANDREW W. MELLON ET AL.	No. 669.
THE PACIFIC STEAM NAVIGATION COMPANY, appellants, *v.* ANDREW W. MELLON ET AL.	No. 670.
NAVIGAZIONE GENERALE ITALIANA, APPELLANTS, *v.* ANDREW W. MELLON ET AL.	No. 678.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF ON BEHALF OF THE APPELLEES.

STATEMENT.

These are appeals by ten foreign steamship companies from final decrees of the District Court of the United States for the Southern District of New York, dismissing bills of complaint filed to enjoin the defendants from enforcing against their ships plying between American and foreign ports the provisions of the National Prohibition Act, as construed by the Attorney General of the United States, and embodied in regulations pursuant thereto made by the Secretary of the Treasury. The cases were heard upon bill and answer on motions made by the plaintiffs for final decrees granting the relief prayed for, and, by the defendants, to dismiss the bills. The motions to

dismiss the bills were granted and decrees accordingly entered.

Each of the plaintiffs is a foreign corporation owning and operating lines of steamships carrying passengers between European and American ports. The defendants are officers of the United States charged with the duty of enforcing the law in question.

The question presented is the application of the Eighteenth Amendment and the National Prohibition Act to intoxicating liquor brought into ports of the United States by foreign ships as part of their sea stores.

The plaintiffs in Nos. 659, 660, 661, 667, 668, and 670 are British corporations operating ships of British registry.

The plaintiff in No. 662 is a French corporation operating ships of French registry.

The plaintiff in No. 666 is a Dutch corporation operating ships of Dutch registry.

The plaintiff in No. 669 is a Danish corporation operating ships of Danish registry.

The plaintiff in No. 678 is an Italian corporation operating ships of Italian registry.

The allegations of the bills are fully set forth in the appellant's brief and need not be repeated.

GROUNDS FOR AN INJUNCTION.

Briefly we may state the facts alleged as grounds upon which the bills ask equitable interference of the court as follows:

(1) It has always been the practice of vessels to carry wines, liquors, and other intoxicating bever-

ages as part of their sea stores for the consumption of the passengers and crew; many of the passengers and of the crews are accustomed to use wines and liquors. If the passengers can not obtain it they will travel by other routes, and if the crews can not have it there will be difficulty in obtaining crews.

(2) A considerable number of the crews of vessels plying between American and Italian ports are Italians, and they carry many third-class passengers for which it is necessary to have Italian stewards. The Italian law requires certain officers and members of the crew of ships carrying third-class passengers to be Italians and compels the ship to furnish one-half liter of wine per day for each third-class passenger and a larger quantity to the crew. In the case of Italian ships, the entire crew must be Italian subjects. The French ships are subject to similar provisions of French law differing in detail, not in principle.

(3) If the National Prohibition Act is enforced so that these ships can not carry wines and liquors, it will result in large financial loss to the owners, and they will suffer much embarrassment from the conflict of laws and the difficulty in obtaining crews.

All the bills contain general allegations to the effect that the defendants intend to enforce the law in such manner as to prevent the carriage of all intoxicating liquors for beverage purposes as sea stores for crew and passengers on foreign vessels entering ports of the United States. The bills allege the lack of an adequate remedy except in a court of equity

and ask that the defendant be enjoined from enforcing the law in the manner threatened.

THE ANSWERS.

The answer in each case sets forth six objections to the bill as follows:

1. The suit is in effect one against the United States and does not aver or show that the United States has consented to be sued;

2. The court has no jurisdiction to grant the relief prayed for;

3. The bill does not present a cause of action in equity under the Constitution of the United States;

4. The bill does not disclose a cause of action equitable in its nature, civil in its character, and arising under the Constitution of the United States;

5. The facts alleged in the bill are insufficient to constitute a valid cause of action in equity;

6. The complainant has a complete remedy at law.

The answer further alleges that any difficulty which the complainants may experience in obtaining adequate crews from among the nationals of countries in which the custom to use alcoholic liquors is widespread would be readily obviated by the payment of higher wages, and that many of the vessels of the American merchant marine carry crews, a portion of whom come from nations accustomed to the use of alcoholic beverages, and that such vessels have never had difficulty in obtaining adequate crews. The answer denies the allegations that the

ruling of the Attorney General and the regulations are and will be void or contrary to the complainants' rights under existing treaties, and denies also the other conclusions alleged in the bill with respect to the unconstitutionality of the interpretation of the prohibition act by the Attorney General. The answer also alleges that if the claim of the plaintiffs is correct it would imply the right of any ship to carry liquors within the territorial waters of the United States; that a large and profitable business has been carried on, resulting in the importation of liquor into this country contrary to the law by vessels with foreign registry; that the former rulings of the Secretary of the Treasury have actually been used as a cloak for smuggling, and that the success of the complainants' contentions will result in a great increase of such operations; that complainants make large profits from the sale of intoxicating liquors on the high seas, and that the loss of such profit is the only definitely ascertainable loss which complainants will suffer; that the sale of intoxicating liquors on American ships has ceased, and that if vessels of foreign registry are facilitated in the sale of liquor on the high seas the resulting damage to the American merchant marine will be great and the result will be, in effect, a differential treatment giving preference to foreign ships over American ships.

THE ISSUE.

The amendment is aimed at the use of liquor for "beverage purposes." The meaning of these words is well understood, but it may be well to note that

the noun *beverage* is defined in the *Standard Dictionary* as: "Drink; that which is drunk; especially a pleasant or refreshing drink, or a habitual one." The vicious thing, therefore, is drinking intoxicants for pleasure, refreshment, or from habit. The definition could not have been phrased more exactly to fit the facts alleged in the bills. The claim is that the officers of the United States intend to prevent the ships from furnishing liquor to passengers and crew who habitually drink it for pleasure and refreshment, and the court is asked to construe the amendment and the enforcement act so as to permit them to bring and have liquor for that purpose within our ports and littoral waters freely and without molestation.

ARGUMENT.

I.

The eighteenth amendment and the national prohibition act require the application of prohibition to every place where the United States may exercise its jurisdiction.

The first section of the Eighteenth Amendment is as follows:

> After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

The things prohibited are—

(1) Manufacture,

(2) Sale,

(3) Transportation,

(4) Importation into, and

(5) Exportation from.

The subject of the prohibition is intoxicating liquors for beverage purposes.

The place of the prohibition is "the United States and all territory subject to the jurisdiction thereof."

By section 2 Congress is given power to enforce the article by appropriate legislation.

Congress, therefore, has express power in its discretion to enact all laws which it may deem desirable or necessary to accomplish the purpose of section 1 of the amendment.

The enforcement statutes.

Congress has passed two acts to enforce the amendment, the National Prohibition Act (41 Stats. Part 1, p. 305) and an act supplemental thereto (act of November 23, 1921, c. 134).

The National Prohibition Act is entitled—

> An act to prohibit intoxicating beverages and to regulate the manufacture, production, use, and sale of high-proof spirits for other than beverage purposes, and to insure an ample supply of alcohol and promote its use in scientific research and in the development of fuel, dye, and other lawful industries.

Section 3 of Title II of that act provides:

> No person shall on or after the date when the eighteenth amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish, or possess any intoxicating liquor except as authorized in this act, and all the provisions of this act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.
>
> Liquor for nonbeverage purposes and wine for sacramental purposes may be manufactured, purchased, sold, bartered, transported, imported, exported, delivered, furnished, and possessed, but only as herein provided, and the commissioner may, upon application, issue permits therefor: * * *

While the act makes provision for the use of intoxicants for medicinal and sacramental purposes, it nowhere contains any provision whereby their use for beverage purposes is made lawful in any place except a private dwelling for the personal consumption of the owner, his family and his bona fide guests. (Sec. 33, Title II.)

By section 17 it is made unlawful to advertise anywhere, or by any means or method, liquor, or the manufacture, sale, keeping for sale or furnishing of the same, or where, how, from whom, or at what price the same may be obtained. No one shall permit any sign or billboard containing such advertisement to remain upon one's premises.

By section 18 of Title II it is unlawful to advertise, manufacture, sell, or possess for sale any utensil,

contrivance, machine, preparation, compound, tablet, substance, formula, direction, or recipe advertised, designed, or intended for use in the unlawful manufacture of intoxicating liquor, and by section 19 no person shall solicit or receive, nor knowingly permit his employee to solicit or receive, from any person any order for liquor or give any information of how liquor may be obtained in violation of the act.

By section 21 it is provided:

> Any room, house, building, *boat*, *vehicle*, structure, or *place* where intoxicating liquor is manufactured, sold, kept, or bartered in violation of this title, and all intoxicating liquor and property kept and used in maintaining the same, is hereby declared to be a common nuisance, and any person who maintains such a common nuisance shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000 or be imprisoned for not more than one year, or both. If a person has knowledge or reason to believe that his room, house, building, *boat*, *vehicle*, structure, or place is occupied or used for the manufacture or sale of liquor contrary to the provision of this title, and suffers the same to be so occupied or used, such room, house, building, boat, vehicle, structure, or place shall be subject to a lien for and may be sold to pay all fines and costs assessed against the person guilty of such nuisance for such violation, and any such lien may be enforced by action in any court having jurisdiction. (Italics ours.)

By section 25 it is unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violating this title or which has been so used, "*and no property rights shall exist in any such liquor or property.*" This section provides for the issuance of search warrants and contains a proviso that no search warrants shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of liquor, or unless it is in part used for some business purpose, and the term "private dwelling" is to be construed to include the "room or rooms used and occupied not transiently but solely as a residence in an apartment house, hotel, or boarding house."

Section 33 of the act provides as follows:

> After February 1, 1920, the possession of liquors by any person not legally permitted under this title to possess liquor shall be prima facie evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this title. Every person legally permitted under this title to have liquor shall report to the commissioner within ten days after the date when the eighteenth amendment of the Constitution of the United States goes into effect, the kind and amount of intoxicating liquors in his possession. But it shall not be unlawful to possess liquors in one's private dwelling while the same is occupied and used

> by him as his dwelling only and such liquor need not be reported, provided such liquors are for use only for the personal consumption of the owner thereof and his family residing in such dwelling and of his bona fide guests when entertained by him therein; and the burden of proof shall be upon the possessor in any action concerning the same to prove that such liquor was lawfully acquired, possessed, and used.

The act may be searched in vain for any provision which allows anyone to have liquor for beverage purposes anywhere except in his dwelling. There is nowhere the suggestion that vessels in our waters enjoy any immunity.

Even the use of liquor as medicine by the sick is drastically restricted.

Under section 7 of Title II not more than a pint of spirituous liquor to be taken internally shall be prescribed for use by the same person within any period of ten days, and no prescription shall be filled more than once, and no one but a physician holding a permit to prescribe liquor shall make any such prescription.

By act of November 23, 1921, c. 134, entitled "An act supplemental to the national prohibition act," it was provided in section 3:

> That this act and the national prohibition act shall apply not only to the United States but to all territory subject to its jurisdiction, including the Territory of Hawaii and the Virgin Islands; * * *

Section 2 provides that only spirituous and vinous liquor may be prescribed for medicinal purposes, and that no physician shall prescribe any vinous liquor containing more than 24 per cent alcohol by volume, or on any prescription, more than one-fourth of a gallon of vinous liquor, or any vinous or spirituous liquor containing separately or in the aggregate more than one-half pint of alcohol for use by any person within any period of ten days. No physician shall be furnished with more than one hundred prescription blanks for use in any period of ninety days, unless on application it shall be clearly apparent to the commissioner that, for some extraordinary reason, a larger amount is necessary. Under the same section, no spirituous liquor shall be imported into the United States, nor shall any permit be granted authorizing the manufacture of any spirituous liquor save alcohol, until the amount of such liquor now in distilleries or other bonded warehouses shall have been reduced to a quantity that, in the opinion of the commissioner will, with liquor that may thereafter be manufactured and imported, be sufficient to supply the current need thereafter for all nonbeverage uses, and no vinous liquor shall be imported into the United States unless it is made to appear to the commissioner that vinous liquor for such nonbeverage use, produced in the United States, is not sufficient to meet such nonbeverage needs. The use of alcoholic liquors for medicinal purposes is thus more drastically restricted, and, whatever may have been true before, since the passage of the act of 1921 the

national prohibition act now applies not only to the United States *but to all territory subject to its jurisdiction*. Its application is, therefore, coextensive with the amendment itself, and if the amendment applied wherever the jurisdiction of the United States extends, the enforcement act has now the same application.

The purpose of the amendment.

The purpose or intent of the States in adopting the Eighteenth Amendment and that of the legislative body in initiating it, must be considered in the light of "the mischief to be prevented" (*Craig* v. *Missouri*, 4 Pet. 410, 431), the subject, the context and the intention of the body inserting the word in the Constitution (*McCulloch* v. *Maryland*, 4 Wheat. 316), "all the aids and lights of contemporary history" (*Kendall* v. *United States ex rel Stokes*, 12 Pet., 524), "in connection with the known condition of affairs out of which the occasion for its adopting may have arisen * * * in a way, so far as is reasonably possible to forward the known purpose or object for which the amendment was adopted" (*Maxwell* v. *Dow*, 176 U. S. 581).

The history of the movement which led to the adoption of the 18th Amendment is a matter of common knowledge, and, whether one agrees with the principle or not, we all recognize the fact that it represents the culmination of a nation-wide movement which had been going on in the United States for many years prosecuted with a zeal which amounted in some cases to the spirit of religious fervor, opposed with a

bitterness equally zealous by those who denounced it as subversive of personal rights and liberties, but aimed at the total eradication of the use of alcoholic liquors of every kind and under all circumstances, except for strictly limited medicinal and sacramental purposes. It was essentially a moral crusade under religious leadership, frankly intended to save the people from a habit believed to be the chief cause of crime, poverty, and misery. It took no account of property rights and allowed no room for differences of opinion. Believing as they did, that the use of liquor did more than any other one thing to debauch and degrade our manhood and womanhood, the advocates of prohibition contended that whatever material hardship might be the direct or indirect result of prohibition, it should count as nothing in view of the evils to be removed and the blessings to follow.

It must be remembered that at the time the amendment was adopted over thirty of the forty-eight States already had absolutely prohibited the liquor traffic, and that all of them had in some measure restrained it. It was well established, as a matter of law, that each State had plenary power to prohibit the traffic and the use, and the Federal Governr ment had, within the limits imposed by the Constitution, lent its aid to the States in their efforts to bring about absolute prohibition. Nevertheless, its advocates were not satisfied and, naturally, for the traffic which they sought to destroy still flourished.

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Believing that the final destruction of the use of liquor for beverage purposes was necessary to the peace and good order of the country and of the world, they felt that that result could only be accomplished by an amendment which would bring to its destruction the full power of the Nation.

Finally it was ratified by forty-five of the forty-eight States. Undoubtedly, when the Amendment thus became an accomplished fact, those who had striven mightily for the result believed that never again, anywhere where the power of the United States could be exerted by law, would the drinking of liquor be lawful. Prohibition was now a fact, throughout the "United States and all territory subject to the jurisdiction thereof." They must have experienced an exaltation of spirit similar to that which moved Mr. Justice Miller in the *Slaughter-house cases* to say of the war between the states, followed by the 13th Amendment (16 Wall. 36, 68):

> In that struggle slavery, as a legalized social relation, perished. It perished as a necessity of the bitterness and force of the conflict. * * * Hence the thirteenth article of amendment of that instrument. Its two short sections seem hardly to admit of construction, so vigorous is their expression and so appropriate to the purpose we have indicated.

After quoting the amendment, he continues:

> To withdraw the mind from the contemplation of this grand yet simple declaration of the personal freedom of all the human race within the jurisdiction of this Government—a

> declaration designed to establish the freedom of four million slaves—and with microscopic search endeavor to find in it a reference to servitudes, which have been attached to property in certain localities, requires an effort, to say the least of it.

Anyone reading the language of the Eighteenth Amendment in the light of the history of the times must read indeed "with microscopic search" to find in the purpose of the amendment anything less complete than the commitment of the United States as a nation unalterably to the policy of suppressing with all its power the drinking of liquor for pleasure, refreshment, or from habit in every place to which its jurisdiction extended. Throughout the jurisdiction of the United States drinking as a "legalized social custom" was to perish under the iron heel of the law.

This court has recognized the force of this contention in *Grogan* v. *Walker*, and *Anchor Line* v. *Aldridge*, decided May 15, 1922. In those cases the court held that the transportation of intoxicants from a foreign port through some part of the United States to another foreign port, and the transshipment of intoxicants from a vessel in a port of the United States to another vessel bound for a foreign port, was a violation of the National Prohibition Act. In those cases Mr. Justice Holmes, speaking for the court, said of the act:

> All the provisions of this act are to be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.

The routine arguments are pressed that this country does not undertake to regulate the habits of people elsewhere, and that the references to beverage purposes and use as a beverage show that it was not attempting to do so; that it has no interest in meddling with transportation across its territory if leakage in transit is prevented, as it has been; that the repeal of statutes and *a fortiori* of treaties by implication is not to be favored; and that even if the letter of a law seems to have that effect a thing may be within the letter yet not within the law when it has been construed. We appreciate all this, but are of opinion that the letter is too strong in this case.

The eighteenth amendment meant a great revolution in the policy of this country, and presumably and obviously meant to upset a good many things on as well as off the statute books. It did not confine itself in any meticulous way to the use of intoxicants in this country. It forbade export for beverage purposes elsewhere. True, this discouraged production here, but that was forbidden already, and the provision applied to liquors already lawfully made. See *Hamilton* v. *Kentucky Distilleries & Warehouse Co.*, 251 U. S. 146, 151, n. 1. It is obvious that those whose wishes and opinions were embodied in the amendment meant to stop the whole business. They did not want intoxicating liquor in the United States and reasonably may have thought that if they let it in some of it was likely to stay.

The vigor of the dissent in that case but lends emphasis to the position taken by the court. The object of the amendment and the national prohibition act was to stop the whole business.

And this applies throughout the United States and all territory subject to the jurisdiction thereof.

It is our contention that the matters decided by this court in the *Grogan* and *Anchor Line cases* not only compelled the Attorney General, in compliance with his oath of office, to give to the Secretary of the Treasury the advice which is at the basis of these actions, but that they require an affirmance of the decrees herein rendered. Judge Hand so regarded them, and his interpretation of their effect seems to us unanswerable. His opinion is printed in the transcripts of the records. (See record in No. 670, pp. 19 *et seq.*) He says (p. 21):

> *Grogan* v. *Walker*, *supra*, and *Anchor Line* v. *Aldridge*, *supra*, plainly meant to adopt a broad canon for the interpretation of the national prohibition act, following the admonition at the end of the first paragraph of section three. Effecting a revolutionary reform in the habits of the Nation, the statute is to be understood as thoroughgoing in its intent to accomplish the results desired. It did not specify the extent of its application in detail, but left that to be gathered from its occasion, and the generality of the words used. It intended to exercise once for all the complete power of Congress under the amendment, and its very want of particularity is a good index that it meant to cover what it could.

> For this reason it is distinguished from earlier local acts of the same kind, as, for example, the Alaskan prohibition act, upon the language of section twenty-nine of which the plaintiffs rely. Indeed, specification in the statute might have defeated its ends, on the theory that what was omitted must be taken as excluded. At least I can not read the two decisions cited without supposing that it was in the foregoing sense that the Supreme Court meant section three to be read.

Continuing, he reasons that there is more ground for supposing that the admonition at the end of the first paragraph of section 3 of the National Prohibition Act covers these ship's stores than did the transportation before this court in the *Grogan* and *Anchor Line cases*. It was necessary to overrule at least as much, if not more, to reach the result in those decisions, especially because there were in them much stronger reasons to imply an exception from the literal language of the act. In those cases there was a statute which gave as much right of transit across the territory of the United States as here, and that statute had the support of the treaty negotiated only five years later, and assumed in the opinion of Mr. Justice Holmes to be still in force. Assuming that the customs laws govern the right to enter ship's stores into the United States, a position very doubtful, since in form it only exempted them from customs duties, it must be conceded that the statute, old as it is, represented only the policy and not the promise of the Nation. He reasons that the custom in mari-

time affairs of long standing to treat ship's stores as part of the ship is not as weighty as the implication against the repeal of a treaty as in the *Grogan* and *Anchor Line cases*. Under the facts of those cases there was no conceivable danger in the transit of liquor, except the chance of its escape, that some of the liquor might not complete its passage. In the cases at bar the danger of an escape is equally present, and in the case of corporations less responsible than the appellants the danger might be great indeed. He then continues:

> The distinction which puts these cases within the law with much greater certainty is the purpose for which the liquors are brought and kept here. Ignoring for the moment the crews, all of the stocks are avowedly intended for the consumption of those who are now within the United States, of which a substantial part are residents or citizens, the very persons whom it was the whole purpose of the amendment to prevent drinking liquors.
>
> Naturally, I have nothing to say about the wisdom of the amendment or the law, but, wise or not, one thing is clear, that a drink of whisky is as hurtful to health and morals outside as inside Ambrose Light. It appears to me inconceivable, when one is discussing the implied intent of Congress, that a statute cast in such sweeping terms should be read as indifferent to open preparations within the United States for the gratification by its citizens of exactly those appetites which it was the avowed intent of the statute altogether to deny. Nor do I believe that anyone would

> hesitate to think so who did not already repudiate the whole reform. If, for example, we were to substitute cocaine or opium for alcohol, I can scarcely think there could be any disinterested difference of opinion. Suppose it were the habit of Chinese vessels to bring to our ports among their stores a proper supply of morphine and opium with the avowed purpose of dispensing it freely to passengers from the United States as soon as they cleared the league limit. Could it be seriously argued that a constitutional amendment and a statute in broad language designed to prevent citizens from using this drug did not cover so palpable a means of nullifying the very purpose of the law? The illustration is extreme only to those who can see no parity between the evils of opium and alcohol.

This court said in the *National Prohibition cases*, 253 U. S. 350, 386, that the first section of the amendment is operative throughout the entire territorial limits of the United States and binds all legislative bodies, courts, and public officers. With such an obligation binding the Attorney General, and with the decision of this court in the *Grogan* and *Anchor Line cases* before him, how could he, mindful of his oath of office, advise the Secretary of the Treasury that he had the power to prepare and promulgate rules and regulations permitting ships to bring to our ports liquor for beverage purposes and openly prepare, within the jurisdiction of the United States, for the gratification by its citizens of exactly those appetites which it was the avowed intent of the

Constitution to deny? Were aliens, temporarily enjoying the hospitality of our ports, in a privileged position and given rights and privileges on boats moored to our docks, denied to our own people on land?

II.

A foreign ship within the territorial waters of the United States is subject to their jurisdiction.

In the first place, it is to be noted that the 18th Amendment is not the only source of the jurisdiction of the United States over foreign ships in our waters. It has always possessed that jurisdiction and has frequently, in common with all nations, exercised it. In the second point in appellants' brief, pages 25 *et sequitur*, many authorities are collected and quoted with respect to the jurisdiction of one nation over ships within its waters belonging to another nation, and also with respect to the jurisdiction of a nation over its own ships wherever they may be. With these authorities we have no dispute. Thus in *United States* v. *Diekelman*, 92 U. S. 520, 525, Mr. Chief Justice Waite says:

> The merchant vessels of one country visiting the ports of another for the purposes of trade subject themselves to the laws which govern the port they visit so long as they remain. (See also *Moore's International Law Digest*, Vol. II, 275 et seq.)

In 1885 Mr. Bayard, Secretary of State, wrote to the French minister as follows:

> A foreign merchant vessel going into the port of a foreign State subjects herself to the

laws of that State and is bound to conform to its commercial as well as to its police and other regulations during the period of her stay there. "She is as much a *subditus temporaneous*," remarks Sir R. Phillimore with reference to such a case, in *The Queen* v. *Keyn*, 2 Ex. D. 82, "as the individual who visits the interior of the country for the purposes of pleasure or business." (*Moore's International Law Digest*, Vol. II, p. 308.)

It is part of the law of civilized nations that when a merchant vessel of one country enters the ports of another for the purposes of trade it subjects itself to the law of the place to which it goes, unless by treaty or otherwise the two countries have come to some different understanding or agreement; for, as was said by Chief Justice Marshall in *The Exchange*, 7 Cranch. 116, 144, "it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the Government to degradation if such * * * merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country." *United States* v. *Diekelman*, 92 U. S. 520; 1 *Phillimore's Int. Law*, 3d ed. 483, sec. 351; *Twiss Law of Nations in Time of Peace*, 229, sec. 159; *Creasy's Int. Law*, 167, sec. 176; *Halleck's Int. Law*, 1st ed. 171. And the English judges have uniformly recognized the rights of the courts of the country of which the port is part to punish crimes committed by one foreigner on another in a foreign merchant ship. *Regina* v. *Cunningham*, Bell C. C.

72; S. C. 8 Cox C. C. 104; *Regina* v. *Anderson*, 11 Cox C. C. 198, 204; S. C. L. R. 1 C. C. 161, 165; *Regina* v. *Keyn*, 13 Cox C. C. 403, 486, 525; S. C. 2 Ex. Div. 63, 161, 213. As the owner has voluntarily taken his vessel for his own private purposes to a place within the dominion of a government other than his own and from which he seeks protection during his stay, he owes that government such allegiance for the time being as is due for the protection to which he becomes entitled. *Wildenhue's case*, 120 U. S. 11, 12.

Oppenheim, in his *International Law*, Vol. I, 3d ed. 339, 340, says:

> Many writers maintain, and the practice of France and some other States support their view, that the littoral State has no jurisdiction in case only the internal order of the ship is affected, or the relations between members of the crew or passengers are alone concerned. However, there is no rule of international law which limits jurisdiction to this extent, and it can therefore claim jurisdiction in all matters over such merchantmen and the persons thereon as have cast anchor within the maritime belt or entered a port. On the other hand, the littoral State is not compelled to exercise such jurisdiction, and many States have therefore by commercial and consular treaties stipulated that in such cases as those in which the internal order of a ship is alone concerned, jurisdiction should be exercised, not by the littoral State, but by the home State through its consul * * *.

In *The Exchange*, 7 Cranch. 135, 143, Mr. Chief Justice Marshall states the rule as follows:

> The jurisdiction of the nation, within its own territory, is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. * * * When private individuals of one nation spread themselves through another, as business or caprice may direct, mingling indiscriminately with the inhabitants of that other, or when merchant vessels enter for the purpose of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such individuals or merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country. Nor can the foreign sovereign have any motive for wishing such exemption. His subjects thus passing into foreign countries are not employed by him, nor are they engaged in national pursuits. Consequently, there are powerful motives for not exempting persons of this description from the jurisdiction of the country in which they are found and no one motive for requiring it. The implied license, therefore, under which they enter can never be construed to grant such exemption.

Again in *The Eagle*, 8 Wall. 15, 22, the Supreme Court holds that:

> All vessels entering into, or departing from, a domestic or foreign port are bound to obey the laws and well-known usages of the port,

> and are subject to seizure and penalties for disobedience; and when submitting to them, they are entitled to all the protection which they afford.

That a ship is also subject to the jurisdiction and laws of the country under whose flag she sails is beyond question, and we need only cite the case of *United States* v. *Bowman*, just decided by this court, No. 69, October term, 1922. From this dual responsibility and jurisdiction it follows—

(1) That a merchant ship, wherever she goes, carries the laws of her country, and for a violation of them those on board may be subjected to punishment.

(2) When she enters the waters of another nation, however, she becomes also subject to the jurisdiction of the laws of the littoral state and is bound to conform to its commercial as well as its police and other regulations so long as she remains.

There seems to be no authority which challenges the right of the littoral state to jurisdiction of all matters which affect its peace, order, and security, as distinguished from matters wholly internal to the ship. The regulation of the liquor traffic has always been regarded as part of the police power, and to it, in the case of the States of the Union, there seems to have been practically no limit. *Crane* v. *Campbell*, 245 U. S. 304. With respect to interstate and foreign commerce the United States has always had plenary power, and the 18th amendment, whatever it may have done, has not limited its power.

Considered with reference to the importation clause of the amendment, the enforcement act becomes a smuggling statute also. We have, therefore, in addition to the well-known difficulties of enforcing prohibition, the age-long difficulty incident to smuggling. Can it be said, therefore, that liquor on board a ship is a matter solely of the internal regulation of the affairs of the ship?

The question of jurisdiction goes far beyond jurisdiction of the ship. It is rather jurisdiction of our ports and littoral waters. That we have such jurisdiction no one will question.

It is not merely liquor on board a ship which offends our law, it is the challenge to our peace, order, security, and national policy of a ship within our waters laden with liquor.

Our waters and ports belong to us, not to the ship. She uses them by our permission, not by her right, and when she uses them she must obey our laws or take the consequences. We could refuse to allow her to come. *Patterson* v. *The Eudora*, 190 U. S. 169. We can and do say how and when she shall come, what papers she shall bring, where she shall lie while in port, when, where, and how she shall discharge her cargo, and when and how she shall depart. No one would ever question our right, or the right of any nation, to prevent a vessel infected with typhus fever from lying alongside a dock. It is jurisdiction over our navigable waters, not over the internal affairs of a ship which we assert.

Our organic law has said that the manufacture, sale, importation, or exportation of liquor as a

beverage shall cease. And that applies throughout the United States and "all territory subject to the jurisdiction thereof." Congress, in its power to enforce that organic law, has said that the possession of liquor under other than limited conditions is a crime, and that any *place* where it is possessed in violation of those conditions is a nuisance. And that applies throughout the United States and "all territory subject to the jurisdiction thereof." Why, then, should it be said that vessels carrying it should be permitted to hover about our shores, anchor in our harbors, and lie alongside our wharves? Are not these "subject to the jurisdiction thereof"?

With "microscopic search" it is argued that the constitutional amendment does not prohibit the possession or use of liquor, but only prohibits sale, importation, or exportation, and if "the national prohibition act goes beyond the limits of the amendment, and prohibits mere possession, it is unsupported by the Constitution, and, to that extent at least, unenforcible." (Appellant's brief, pp. 73, 74.) But to forbid possession is a reasonable method of stopping sale, importation, and exportation.

> As the State has the power above indicated to prohibit, it may adopt such measures as are reasonably appropriate or needful to render exercise of that power effective. * * * And, considering the notorious difficulties always attendant upon efforts to suppress traffic in liquors, we are unable to say that the challenged inhibition of their possession was arbitrary and unreasonable or without

> proper relation to the legitimate legislative purpose. *Crane* v. *Campbell*, 245 U. S. 304, 307.

The appellants urge that the courts never give a construction to a statute contrary to international law or the accepted custom and usage of civilized nations when it is possible reasonably to construe it in another manner, and they say that the same rule *a fortiori* should apply to the construction of a provision of the Constitution. But we must remember that—

> The Eighteenth Amendment meant a great revolution in the policy of this country, and presumably and obviously meant to upset a good many things on as well as off the statute book. It did not confine itself in any meticulous way to the use of intoxicants in this country. *Grogan and Anchor Line cases, supra.*

It applied to the United States and all territory subject to the jurisdiction thereof.

The amendment represents a declared policy of the country, contrary we may for the sake of argument admit, to the custom and usage of most civilized nations. It was declared by the supreme power of the people as part of their organic law, and it is the supreme law of the land. It binds legislatures, courts, officials, and individuals, and of its own force invalidates everything which authorizes that which it prohibits. *National Prohibition cases, supra.* What room is there here for spelling out a duty on the part of the court to conform or to construe this national policy so as to harmonize it with customs and usages

of nations whose policies are entirely different? Would any one say that the Thirteenth Amendment must be construed in accordance with the customs and usages of nations which include slavery among their policies? Slavery and liquor are now equally foreign to our lawful institutions. The constitutional ban admits of no compromise. The enforcement act is not a statute to regulate, it is a statute to prohibit. *Toleration in accordance with custom and usage may be consistent with regulation, but not with prohibition.* The national prohibition act, we submit, should be construed in accordance with the national policy, declared in the amendment, and by no other standard. If that policy is utterly to banish liquor as a beverage, and if the language of the enforcement act is, and since the act of 1921 it surely is, broad enough to cover all places subject to the jurisdiction of the United States, it should be so construed.

It is to be remembered that we are not considering here a revenue measure, or a patent law, involving merely individual rights (*Brown* v. *Duchesne*, 19 How. 183), or a commercial regulation; we are not concerned with the rights of seamen (*The State of Maine*, 22 Fed. 743; *The Kestor*, 110 Fed. 432; *Patterson* v. *The Eudora*, 190 U. S. 170; *Sandberg* v. *McDonald*, 248 U. S. 185; *Neilson* v. *Rhine Shipping Company*, 248 U. S. 105), nor with the immigration of contract laborers (*Scharrenberg* v. *Dollar Steamship Company*, 245 U. S. 122). We are not attempting to adjust a complicated problem involved in the seizure of vessels as prizes in time of war or under

embargo or nonintercourse statutes. (*The Habana*, 175 U. S. 677; *The Charming Betsy*, 2 Cranch 64.) We are enforcing a national policy, drastic, revolutionary, and, as its foremost proponents claim, evangelistic in its proclamation and purpose. We know of no consideration of comity or expediency which may be heard to weaken or interfere with it anywhere in "the United States or the territory subject to the jurisdiction thereof."

This court has already had "the routine arguments" pressed, that "this country does not undertake to regulate the habits of people elsewhere"; that it has "no interest in meddling with transportation across its territory if leakage in transit is prevented"; that the repeal of "statutes and *a fortiori* of treaties by implication is not to be favored," and that if the letter of the law seems to have that effect—"A thing may be within the letter yet not within the law when it has been construed"—and has given no uncertain answer.

III.

There is no distinction between cargo and sea stores which would distinguish liquor carried as such from liquor carried as cargo, or which would indicate that liquor carried as sea stores is intended by Congress to be exempt from the provisions of the 18th amendment and the national prohibition act.

The collection act of March 2, 1799, whose provisions were incorporated in the Revised Statutes, has until recently contained the regulations for the

manifesting of cargo and sea stores. Section 2806, Revised Statutes, provided that no merchandise should be brought into the United States from any foreign port in any vessel without a manifest in writing of the cargo signed by the master. Section 2807 set forth what must be included in the manifest, and one thing was "an account of the sea stores remaining, if any." Sections 2795, 2796, and 2797 further particularized the requirements in manifesting sea stores in order to prevent the importation of such sea stores. Section 2795 was as follows:

> In order to ascertain what articles ought to be exempt from duty as the sea stores of a vessel, the master shall particularly specify the articles in the report or manifest to be by him made, designating them as the sea stores of such vessel; and in the oath to be taken by such master, on making such report, he shall declare that the articles so specified as sea stores are truly such, and are not intended by way of merchandise or for sale; whereupon the articles shall be free from duty.

By section 2796, if it appeared to the collector that the quantities of articles reported as sea stores were excessive, the collector could estimate the amount of the duty on the excess, which should forthwith be paid on pain of forfeiture. Section 2797 provided that if any articles were found on board as sea stores other than those specified, or if they were landed without a permit, all such articles should be forfeited. Section 2775 reads as follows:

> The master of any vessel having on board distilled spirits or wines shall, within forty-

> eight hours after his arrival, whether the same be at the first port of arrival of such vessel or not, in addition to the requirements of the preceding section, report in writing to the surveyor or officer acting as inspector of the revenue of the port at which he has arrived, the foreign port from which he last sailed, the name of his vessel, his own name, the tonnage and denomination of such vessel, and to what nation belonging, together with the quantity and kinds of spirits and wines on board of the vessel, particularizing the number of casks, vessels, cases, or other packages containing the same, with their marks and numbers, as also the quantity and kinds of spirits and wines on board such vessel as sea stores, and in default thereof he shall be liable to a penalty of five hundred dollars, and any spirits omitted to be reported shall be forfeited.

It is obvious that sea stores, therefore, have always been treated in our customs laws in the same manner as cargo. They were to be manifested and, if landed without a permit, forfeited. Liquors as sea stores were covered by special requirements and were to be reported with the other liquors on board.

Nor is it true, as claimed, that sea stores have always been regarded as part of the ship. A ship and the things on board other than passengers' baggage have always been, by the customs laws at least, classified under three heads, (1) the ship, its tackle, apparel, and furniture, (2) its cargo, (3) its sea stores. See sections of the Revised Statutes referred to *supra; United States* v. *24 Coils Cordage*,

28 Fed. Cas. 276; *United States* v. *1 Hempen Cable*, 27 Fed. Cas. 26. In the latter case Judge Davis, in the District court of Massachusetts, considering the customs laws and referring to sea stores, said that the words "sea stores" were applicable "not to the tackle and apparel of the ship, furniture, sails, rigging, cables, or anchors. These are to be considered as attached to the ship and so belonging to the ship that it is no more necessary to include them in the manifest than the ship itself."

The tariff act of Sept. 21, 1922, in its later sections, revised the collection act of May 2, 1799, incorporated in the Revised Statutes. By section 642 of the act of 1922 sections 2775, 2795, 2796, 2797, 2806, and 2809 of the Revised Statutes were repealed. The fact that section 2775 was repealed is convincing evidence that Congress did not intend that liquor should be carried either as cargo or as sea stores. This is particularly suggestive when we consider that, in the later sections of the tariff act of 1922, most of the provisions of the old act of 1799 were reenacted in one form or another with the exception of those which had to do with liquor. Can it reasonably be said that a Congress which revised the old collection act and left out of it all provisions for manifesting liquors, and showed its intention to make the old sections comply with present conditions, intended that liquors might be carried as ships' stores? Nowhere either in the old act or the new is there any limitation upon the amount of merchandise which can be carried as sea stores. Is it

reasonable to suppose that Congress intended to allow a vessel to carry as sea stores any amount of liquor which she might choose, to stay in our ports with it as long as she chose, with only a penalty of having it treated as imported merchandise if any of it was landed? It would seem to follow by necessary implication that if Congress, when it passed the tariff act of September 21, 1922, and repealed the provisions of section 2775 of the Revised Statutes specifically providing for reporting liquors forming part of the sea stores of a vessel, had intended to allow such liquors to be included as sea stores, it would have made some specific provision for them, including the amount which might be carried, and carefully drawn safeguards against smuggling.

IV.

Summary and conclusion.

Our construction of the enforcement laws must follow the policy of our country declared in the eighteenth amendment. The language of the statutes is broad enough to give complete effect to that policy wherever the jurisdiction of the United States extends. It should therefore be given such effect. That it may cause loss is evident. That it may offend friends beyond the sea is indeed regrettable. The difficulties, however, are probably greater in imagination than they will prove to be in reality. We have no reason to believe that the Governments of Italy and France will object to recasting their

shipping regulations so as to conform to our law as soon as that law is settled by this court. And, beyond all question, our Constitution can not be made to yield to their shipping regulations. Surely, those nations would not tolerate the commission in their ports by foreign vessels of what their law regards as nuisances, and they will readily see the impropriety of allowing their vessels thus to offend in our ports.

The judgments appealed from, therefore, should be affirmed.

JAMES M. BECK,
Solicitor General.
MABEL WALKER WILLEBRANDT,
Assistant Attorney General.
ALFRED A. WHEAT,
Special Assistant to the Attorney General.

DECEMBER, 1922.

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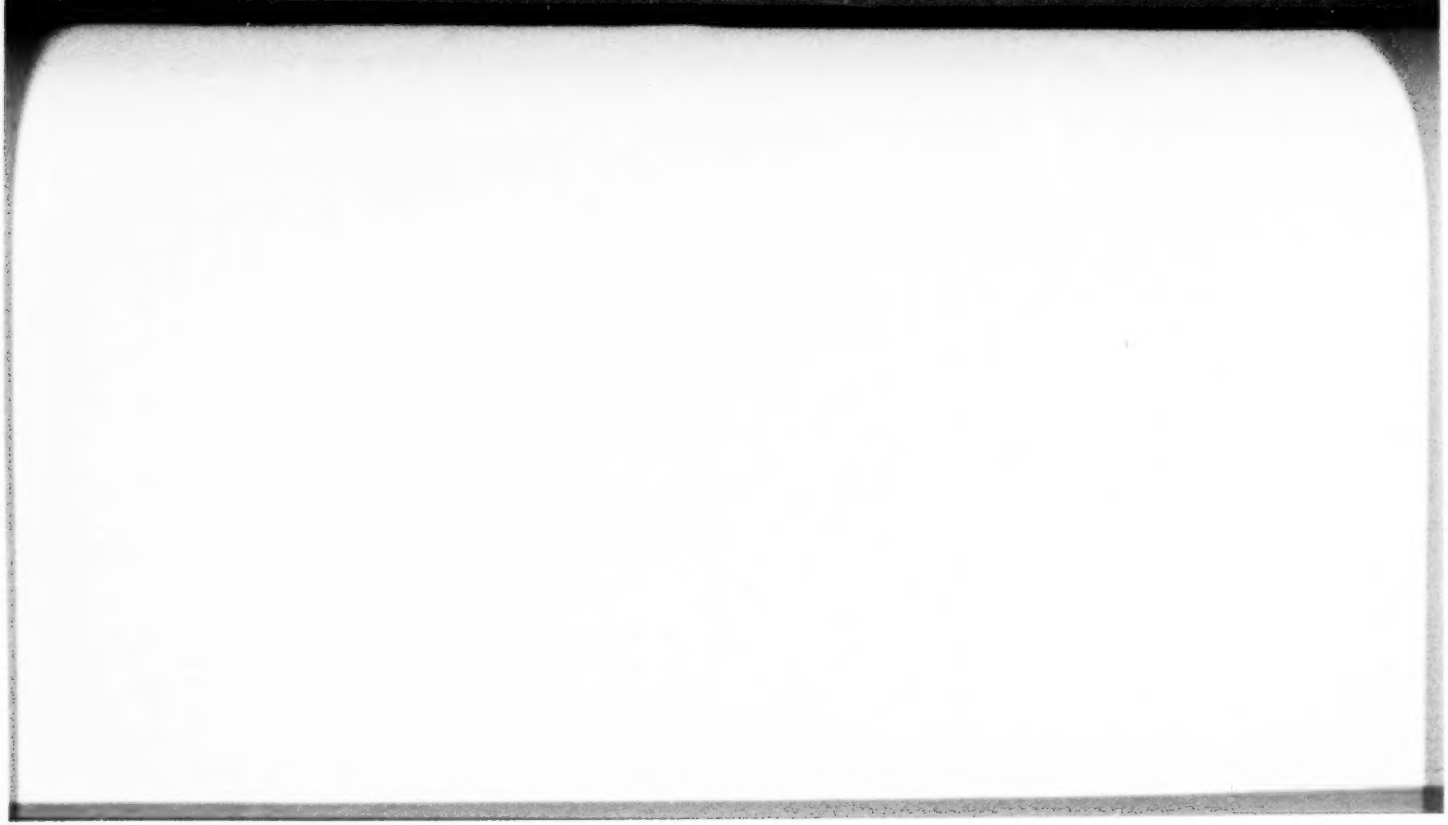

IN THE

Supreme Court of the United States

OCTOBER TERM, 1922

THE CUNARD STEAMSHIP COMPANY, LTD., and ANCHOR LINE (HENDERSON BROTHERS) LTD., Appellants, against ANDREW W. MELLON, et. al., Appellees.	#659.
OCEANIC STEAM NAVIGATION COMPANY, LTD., Appellants, against ANDREW W. MELLON, et. al., Appellees.	#660.
INTERNATIONAL NAVIGATION COMPANY, LTD., Appellants, against HENRY C. STUART, et. al., Appellees.	#661.
COMPAGNIE GENERALE TRANSATLANTIQUE, Appellants, against ANDREW W. MELLON, et. al., Appellees.	#662.
THE NETHERLANDS AMERICAN STEAM NAVIGATION COMPANY (HOLLAND AMERICAN LINE), Appellants, against ANDREW W. MELLON, et. al., Appellees.	#666.
LIVERPOOL BRAZIL AND RIVER PLATE STEAM NAVIGATION COMPANY, LTD., Appellants, against ANDREW W. MELLON, et. al., Appellees.	#667.
THE ROYAL MAIL STEAM PACKET COMPANY, Appellants, against ANDREW W. MELLON, et. al., Appellees.	#668.
UNITED STEAMSHIP COMPANY OF COPENHAGEN (SCANDINAVIAN AMERICAN LINE), Appellants, against ANDREW W. MELLON, et. al., Appellees.	#669.
THE PACIFIC STEAM NAVIGATION COMPANY, Appellants, against ANDREW W. MELLON, et. al., Appellees.	#670.
NAVIGAZIONE GENERALE ITALIANA, Appellants, against ANDREW W. MELLON, et. al., Appellees.	#678.

PLEASE TAKE NOTICE that on Monday, November 13, 1922, at twelve o'clock noon, or as soon thereafter as counsel may be heard, the appellants herein will submit to the Supreme Court of the United States a motion, a copy of which is hereto annexed, petitioning said Court to advance the above entitled cause for early hearing.

Dated, November 1, 1922.

GEORGE W. WICKERSHAM,
Counsel for Appellants,
Office and P. O. Address,
No. 40 Wall Street,
Borough of Manhattan,
City of New York.

To

HON. HARRY M. DAUGHERTY,
Attorney General of the United States,
Attorney for Appellees.

In the
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NAVIGAZIONE GENERALE ITALIANA, Appellants, against ANDREW W. MELLON, et. al., Appellees.	#678.

On Appeal from The District Court of The United States for The Southern District of New York.

The Appellants move that these causes be advanced for hearing at an early date. These appeals are taken from final decrees of the District Court of the United States for the Southern District of New York in each case, dismissing the bill of complaint.

The bills of complaint prayed for an injunction restraining defendants from enforcing, or attempting to enforce against the various complainants, any of the forfeitures or penalties provided for in the National Prohibition Act by reason of the carriage by their vessels within the territorial waters of the United States of intoxicating liquor as sea stores intended for the use of passengers and crew of said vessels outside the territorial waters of the United States.

Complainants are foreign corporations and their vessels all fly foreign flags and are owned and registered in foreign countries.

The bills of complaint were filed to restrain the threatened acts of the defendants to make and carry out orders following an Opinion of the Attorney General of the United States, which held that foreign vessels were violating the provisions of the Eighteenth Amendment and the National Prohibition Act by keeping on board while in the territorial waters of the United States sea stores including intoxicating liquors intended for use by passengers and crew without the jurisdiction of this country.

This ruling is contrary to the opinion of a prev-

ious Attorney General and to existing regulations of the Secretary of the Treasury.

The necessary jurisdictional facts appear in the Bills of Complaint and the Secretary of the Treasury voluntarily appeared and submitted himself to the jurisdiction of the court.

The decision of the District Court, from which this appeal is taken, affects all foreign vessels of every nation touching at ports of the United States.

Due notice of the presentation of this motion has been given to the Attorney General of the United States, counsel for appellees.

An early hearing of this appeal is therefore desirable in the public interest, as well as in the interest of complainants and all other foreign steamship lines similarly situated.

GEORGE W. WICKERSHAM,
Counsel for Appellants.

INDEX.

CITATIONS.

In the Supreme Court of the United States.

OCTOBER TERM, 1922.

INTERNATIONAL MERCANTILE MARINE COMPANY, appellant, *v.* H. C. STUART, ACTING COLLECTOR, ETC., et al.	No. 693.
UNITED AMERICAN LINES, INCORPORATED; Atlantic Mail Corporation, American Ship & Commerce Navigation Corporation, et al., appellants, *v.* HENRY C. STUART, ACTING COLLECTOR, etc., et al.	No. 694.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF ON BEHALF OF APPELLANTS.

These are appeals from final decrees of the United States District Court for the Southern District of New York dismissing bills of complaint filed against the defendants who are officers of the United States charged with the duty of enforcing the National Prohibition law.

The relief asked in No. 693, the *International Mercantile Marine Company case*, is an injunction restraining the defendants (1) from enforcing or attempting to enforce against the complainant or its steamships any of the seizures, pains, forfeitures, and penalties provided in the National Prohibition Act or in laws, or in regulations of the Secretary of the Treasury; (2) from arresting and prosecuting the complainant, its officers, etc., for or on account of the alleged violations by them of the regulations or of acts of Congress on the ground or claim of having intoxicating liquors on board complainants' vessels as sea stores while in the port of New York; (3) from refusing to issue to the complainants or its ships permits for clearance from the port of New York, or in any way interfering with the arrival or departure of the steamships with liquor on board sealed as sea stores; (4) from seizing, molesting, or otherwise interfering with the complainants in the peaceful possession of said intoxicating liquors on board its vessels as part of their sea stores; (5) from enforcing against the complainant or its steamers any of the penalties provided in the acts of Congress or the regulations of the Secretary of the Treasury by reason of any sale of liquor carried as sea stores which may be made on the high seas or in foreign ports.

The relief asked in the bill in No. 694, the *United American Lines case*, is substantially the same, and in addition asks an injunction against the defendants from arresting and prosecuting the complainants

their officers, agents, etc., or from attempting any seizure or forfeiture of any intoxicating liquors carried as sea stores on board certain-named steamships of the complainants, or the said steamships, by reason of the fact that such intoxicating liquors may be sold on the high seas and in foreign ports and outside the territorial waters of the United States.

These cases raise the question of the right of American ships to carry intoxicating liquors designed for beverage purposes as part of their sea stores within the territorial waters of the United States, and to sell and furnish them to passengers and crew upon the high seas and in foreign ports.

Each of the complainants is an American corporation, and its ships are of American registry regularly plying between the port of New York and foreign ports, and, in the case of the United American Lines, two of the ships have been chartered for cruises between January and May, 1923, one for an around the world cruise and the other for a cruise to South America and the West Indies. The facts alleged as grounds for the relief asked are in substance these:

(1) That for a long time in connection with the operation of the steamships the complainants have kept as part of the regular sea stores of their vessels wines and other intoxicating liquors, which were sold in foreign ports and on the high seas for the convenience of their passengers, many of whom are of nationalities who habitually use them as part of their regular diet; that the beverages are lawfully acquired, and there is nothing in the Eighteenth Amendment or

the National Prohibition Act which prevents their use as aforesaid, and therefore that the enforcement of the prohibition law and regulations against them or their ships because of the possession and use of the liquor would be unlawful and would cause them irreparable damage, for which they have no adequate remedy at law. The answers merely deny the conclusions and equities of the bills.

The only substantial difference in the facts between these cases and the cases of the Cunard Steamship Company and other foreign companies is that these ships are American ships, sailing under the American flag and operated by American companies. The purpose for which the liquor is to be used is the same, that is, it is to be used as a beverage by people who are accustomed so to use it.

THE ISSUE.

The amendment is aimed at the use of liquor for "beverage purposes." The meaning of these words is well understood, but it may be well to note that the noun *beverage* is defined in the *Standard Dictionary* as: "Drink; that which is drunk; especially a pleasant or refreshing drink, or a habitual one." The vicious thing, therefore, is drinking intoxicants for pleasure, refreshment, or from habit. The definition could not have been phrased more exactly to fit the facts alleged in the bills. The claim is that the officers of the United States intend to prevent the ships from furnishing liquor to passengers and crew who habitually drink it for pleasure and re-

freshment, and the court is asked to construe the Amendment and the enforcement act so as to permit them to bring and have liquor for that purpose within our ports and littoral waters freely and without molestation and to sell it on the high seas and in foreign ports.

ARGUMENT.

I.

The eighteenth amendment and the national prohibition act require the application of prohibition to every place where the United States may exercise its jurisdiction.

The first section of the Eighteenth Amendment is as follows:

> After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

The things prohibited are—

(1) Manufacture,

(2) Sale,

(3) Transportation,

(4) Importation into, and

(5) Exportation from.

The subject of the prohibition is intoxicating liquors for beverage purposes.

The place of the prohibition is "the United States and all territory subject to the jurisdiction thereof."

By section 2 Congress is given power to enforce the article by appropriate legislation.

Congress, therefore, has express power in its discretion to enact all laws which it may deem desirable or necessary to accomplish the purpose of section 1 of the amendment.

The enforcement statutes.

Congress has passed two acts to enforce the amendment, the National Prohibition Act (41 Stats. part 1, p. 305) and an act supplemental thereto (act of November 23, 1921, c. 134).

The National Prohibition Act is entitled—

> An act to prohibit intoxicating beverages and to regulate the manufacture, production, use, and sale of high-proof spirits for other than beverage purposes, and to insure an ample supply of alcohol and promote its use in scientific research and in the development of fuel, dye, and other lawful industries.

Section 3 of Title II of that act provides:

> No person shall on or after the date when the eighteenth amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish, or possess any intoxicating liquor except as authorized in this act, and all the provisions of this act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.
>
> Liquor for nonbeverage purposes and wine for sacramental purposes may be manufactured, purchased, sold, bartered, transported,

> imported, exported, delivered, furnished, and possessed, but only as herein provided, and the commissioner may, upon application, issue permits therefor: * * *

While the act makes provision for the use of intoxicants for medicinal and sacramental purposes, it nowhere contains any provision whereby their use for beverage purposes is made lawful in any place except a private dwelling for the personal consumption of the owner, his family, and his bona fide guests. (Sec. 33, Title II.)

By section 17 it is made unlawful to advertise anywhere, or by any means or method, liquor, or the manufacture, sale, keeping for sale or furnishing of the same, or where, how, from whom, or at what price the same may be obtained. No one shall permit any sign or billboard containing such advertisement to remain upon one's premises.

By section 18 of Title II it is unlawful to advertise, manufacture, sell, or possess for sale any utensil, contrivance, machine, preparation, compound, tablet, substance, formula, direction, or recipe advertised, designed, or intended for use in the unlawful manufacture of intoxicating liquor, and by section 19 no person shall solicit or receive, nor knowingly permit his employee to solicit or receive, from any person any order for liquor or give any information of how liquor may be obtained in violation of the act.

By section 21 it is provided:

> Any room, house, building, *boat*, *vehicle*, structure, or *place* where intoxicating liquor

> is manufactured, sold, kept, or bartered in violation of this title, and all intoxicating liquor and property kept and used in maintaining the same, is hereby declared to be a common nuisance, and any person who maintains such a common nuisance shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000 or be imprisoned for not more than one year, or both. If a person has knowledge or reason to believe that his room, house, building, *boat, vehicle,* structure, or place is occupied or used for the manufacture or sale of liquor contrary to the provision of this title, and suffers the same to be so occupied or used, such room, house, building, boat, vehicle, structure, or place shall be subject to a lien for and may be sold to pay all fines and costs assessed against the person guilty of such nuisance for such violation, and any such lien may be enforced by action in any court having jurisdiction. (Italics ours.)

By section 25 it is unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violating this title or which has been so used, "*and no property rights shall exist in any such liquor or property.*" This section provides for the issuance of search warrants and contains a proviso that no search warrants shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of liquor, or unless it is in part used for some business purpose, and the term "private dwelling" is

to be construed to include the "room or rooms used and occupied not transiently but solely as a residence in an apartment house, hotel, or boarding house."

Section 33 of the act provides as follows:

> After February 1, 1920, the possession of liquors by any person not legally permitted under this title to possess liquor shall be prima facie evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this title. Every person legally permitted under this title to have liquor shall report to the commissioner within ten days after the date when the eighteenth amendment of the Constitution of the United States goes into effect, the kind and amount of intoxicating liquors in his possession. But it shall not be unlawful to possess liquors in one's private dwelling while the same is occupied and used by him as his dwelling only and such liquor need not be reported, provided such liquors are for use only for the personal consumption of the owner thereof and his family residing in such dwelling and of his bona fide guests when entertained by him therein; and the burden of proof shall be upon the possessor in any action concerning the same to prove that such liquor was lawfully acquired, possessed, and used.

The act may be searched in vain for any provision which allows anyone to have liquor for beverage purposes anywhere except in his dwelling. There is

nowhere the suggestion that vessels in our waters enjoy any immunity.

Even the use of liquor as medicine by the sick is drastically restricted.

Under section 7 of Title II not more than a pint of spirituous liquor to be taken internally shall be prescribed for use by the same person within any period of ten days, and no prescription shall be filled more than once, and no one but a physician holding a permit to prescribe liquor shall make any such prescription.

By act of November 23, 1921, c. 134, entitled "An act supplemental to the national prohibition act," it was provided in section 3:

> That this act and the national prohibition act shall apply not only to the United States but to all territory subject to its jurisdiction, including the Territory of Hawaii and the Virgin Islands; * * *

Section 2 provides that only spirituous and vinous liquor may be prescribed for medicinal purposes, and that no physician shall prescribe any vinous liquor containing more than 24 per cent alcohol by volume, or on any prescription more than one-fourth of a gallon of vinous liquor, or any vinous or spiritous liquor containing separately or in the aggregate more than one-half pint of alcohol for use by any person within any period of ten days. No physician shall be furnished with more than one hundred prescription blanks for use in any period of ninety days, unless on application it shall be clearly apparent to the com-

missioner that, for some extraordinary reason, a larger amount is necessary. Under the same section, no spirituous liquor shall be imported into the United States, nor shall any permit be granted authorizing the manufacture of any spirituous liquor save alcohol, until the amount of such liquor now in distilleries or other bonded warehouses shall have been reduced to a quantity that, in the opinion of the commissioner will, with liquor that may thereafter be manufactured and imported, be sufficient to supply the current need thereafter for all nonbeverage uses, and no vinous liquor shall be imported into the United States unless it is made to appear to the commissioner that vinous liquor for such nonbeverage use, produced in the United States, is not sufficient to meet such nonbeverage needs. The use of alcoholic liquors for medicinal purposes is thus more drastically restricted, and, whatever may have been true before, since the passage of the act of 1921 the National Prohibition Act now applies not only to the United States *but to all territory subject to its jurisdiction*. Its application is, therefore, coextensive with the amendment itself, and if the amendment applied wherever the jurisdiction of the United States extends, the enforcement act has now the same application.

The purpose of the amendment.

The purpose or intent of the States in adopting the Eighteenth Amendment and that of the legislative body in initiating it, must be considered in the light

of "the mischief to be prevented" (*Craig* v. *Missouri*, 4 Pet. 410, 431), the subject, the context, and the intention of the body inserting the word in the Constitution (*McCulloch* v. *Maryland*, 4 Wheat. 316), "all the aids and lights of contemporary history" (*Kendall* v. *United States ex rel. Stokes*, 12 Pet. 524), "in connection with the known condition of affairs out of which the occasion for its adopting may have arisen * * * in a way, so far as is reasonably possible to forward the known purpose or object for which the amendment was adopted" (*Maxwell* v. *Dow*, 176 U. S. 581).

The history of the movement which led to the adoption of the 18th Amendment is a matter of common knowledge, and, whether one agrees with the principle or not, we all recognize the fact that it represents the culmination of a nation-wide movement which had been going on in the United States for many years prosecuted with a zeal which amounted in some cases to the spirit of religious fervor, opposed with a bitterness equally zealous by those who denounced it as subversive of personal rights and liberties, but aimed at the total eradication of the use of alcoholic liquors of every kind and under all circumstances, except for strictly limited medicinal and sacramental purposes. It was essentially a moral crusade under religious leadership, frankly intended to save the people from a habit believed to be the chief cause of crime, poverty, and misery. It took no account of property rights and allowed no room for differences of opinion. Believing as they did, that the

use of liquor did more than any other one thing to debauch and degrade our manhood and womanhood, the advocates of prohibition contended that whatever material hardship might be the direct or indirect result of prohibition, it would count as nothing in view of the evils to be removed and the blessings to follow.

It must be remembered that at the time the amendment was adopted over thirty of the forty-eight States already had absolutely prohibited the liquor traffic, and that all of them had in some measure restrained it. It was well established, as a matter of law, that each State had plenary power to prohibit the traffic and the use, and the Federal Government had, within the limits imposed by the Constitution, lent its aid to the States in their efforts to bring about absolute prohibition. Nevertheless, its advocates were not satisfied and, naturally, for the traffic which they sought to destroy still flourished. Believing that the final destruction of the use of liquor for beverage purposes was necessary to the peace and good order of the country and of the world, they felt that that result could only be accomplished by an Amendment which would bring to its destruction the full power of the Nation.

Finally it was ratified by forty-five of the forty-eight States. Undoubtedly, when the Amendment thus became an accomplished fact, those who had striven mightily for the result believed that never again, anywhere where the power of the United States could be exerted by law, would the drinking

of liquor be lawful. Prohibition was now a fact, throughout the "United States and all territory subject to the jurisdiction thereof." They must have experienced an exaltation of spirit similar to that which moved Mr. Justice Miller in the *Slaughter-house cases* to say of the war between the States, followed by the 13th Amendment (16 Wall. 36, 68):

> In that struggle slavery, as a legalized social relation, perished. It perished as a necessity of the bitterness and force of the conflict. * * * Hence the thirteenth article of amendment of that instrument. Its two short sections seem hardly to admit of construction, so vigorous is their expression and so appropriate to the purpose we have indicated.

After quoting the amendment, he continues:

> To withdraw the mind from the contemplation of this grand yet simple declaration of the personal freedom of all the human race within the jurisdiction of this Government—a declaration designed to establish the freedom of four million slaves—and with microscopic search endeavor to find in it a reference to servitudes, which have been attached to property in certain localities, requires an effort, to say the least of it.

Anyone reading the language of the Eighteenth Amendment in the light of the history of the times must read indeed "with microscopic search" to find in the purpose of the amendment anything less complete than the commitment of the United States as a nation unalterably to the policy of suppressing with

all its power the drinking of liquor for pleasure, refreshment, or from habit in every place to which its jurisdiction extended. Throughout the jurisdiction of the United States drinking as a "legalized social custom" was to perish under the iron heel of the law.

This court has recognized the force of this contention in *Grogan* v. *Walker*, and *Anchor Line* v. *Aldridge*, decided May 15, 1922. In those cases the court held that the transportation of intoxicants from a foreign port through some part of the United States to another foreign port, and the transshipment of intoxicants from a vessel in a port of the United States to another vessel bound for a foreign port, was a violation of the National Prohibition Act.

In those cases Mr. Justice Holmes, speaking for the court, said of the National Prohibition Act:

> All the provisions of this act are to be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.
>
> The routine arguments are pressed that this country does not undertake to regulate the habits of people elsewhere, and that the references to beverage purposes and use as a beverage show that it was not attempting to do so; that it has no interest in meddling with transportation across its territory if leakage in transit is prevented, as it has been; that the repeal of statutes and *a fortiori* of treaties by implication is not to be favored; and that even if the letter of a law seems to have that effect a thing may be within the letter yet not within

> the law when it has been construed. We appreciate all this, but are of opinion that the letter is too strong in this case.
>
> The eighteenth amendment meant a great revolution in the policy of this country, and presumably and obviously meant to upset a good many things on as well as off the statute books. It did not confine itself in any meticulous way to the use of intoxicants in this country. It forbade export for beverage purposes elsewhere. True, this discouraged production here, but that was forbidden already, and the provision applied to liquors already lawfully made. See *Hamilton* v. *Kentucky Distilleries & Warehouse Co.*, 251 U. S. 146, 151, n. 1. It is obvious that those whose wishes and opinions were embodied in the amendment meant to stop the whole business. They did not want intoxicating liquor in the United States and reasonably may have thought that if they let it in some of it was likely to stay.

The vigor of the dissent in that case but lends emphasis to the position taken by the court. The object of the Amendment and the National Prohibition Act was to stop the whole business.

And this applies throughout the United States and all territory subject to the jurisdiction thereof.

It is our contention that the matters decided by this court in the *Grogan* and *Anchor Line cases* not only compelled the Attorney General, in compliance with his oath of office, to give to the Secretary of the Treasury the advice which is at the basis of these actions, but that they require an affirmance of the

decrees herein rendered. Judge Hand so regarded them, and his interpretation of their effect seems to us unanswerable. In his opinion in the case of the foreign ships he says (see record in No. 693, pp. 28 *et seq.*):

> *Grogan* v. *Walker*, *supra*, and *Anchor Line* v. *Aldridge*, *supra*, plainly meant to adopt a broad canon for the interpretation of the national prohibition act, following the admonition at the end of the first paragraph of section three. Effecting a revolutionary reform in the habits of the Nation, the statute is to be understood as thoroughgoing in its intent to accomplish the results desired. It did not specify the extent of its application in detail, but left that to be gathered from its occasion, and the generality of the words used. It intended to exercise once for all the complete power of Congress under the amendment, and its very want of particularity is a good index that it meant to cover what it could. For this reason it is distinguished from earlier local acts of the same kind, as, for example, the Alaskan prohibition act, upon the language of section twenty-nine of which the plaintiffs rely. Indeed, specification in the statute might have defeated its ends, on the theory that what was omitted must be taken as excluded. At least I can not read the two decisions cited without supposing that it was in the foregoing sense that the Supreme Court meant section three to be read.

Under the facts of those cases there was no conceivable danger in the transit of liquor, except the

chance of its escape, that some of the liquor might not complete its passage. In the cases at bar the danger of an escape is equally present, and in the case of corporations less responsible than the appellants the danger might be great indeed. He then continues:

> The distinction which puts these cases within the law with much greater certainty is the purpose for which the liquors are brought and kept here. Ignoring for the moment the crews, all of the stocks are avowedly intended for the consumption of those who are now within the United States, of which a substantial part are residents or citizens, the very persons whom it was the whole purpose of the amendment to prevent drinking liquors.
>
> Naturally, I have nothing to say about the wisdom of the amendment or the law, but, wise or not, one thing is clear, that a drink of whisky is as hurtful to health and morals outside as inside Ambrose Light. It appears to me inconceivable, when one is discussing the implied intent of Congress, that a statute cast in such sweeping terms should be read as indifferent to open preparations within the United States for the gratification by its citizens of exactly those appetites which it was the avowed intent of the statute altogether to deny. Nor do I believe that anyone would hesitate to think so who did not already repudiate the whole reform. If, for example, we were to substitute cocaine or opium for alcohol, I can scarcely think there could be any disin-

> terested difference of opinion. Suppose it were the habit of Chinese vessels to bring to our ports among their stores a proper supply of morphine and opium with the avowed purpose of dispensing it freely to passengers from the United States as soon as they cleared the league limit. Could it be seriously argued that a constitutional amendment and a statute in broad language designed to prevent citizens from using this drug did not cover so palpable a means of nullifying the very purpose of the law? The illustration is extreme only to those who can see no parity between the evils of opium and alcohol.

This court said in the *National Prohibition cases*, 253 U. S. 350, 386, that the first section of the amendment is operative throughout the entire territorial limits of the United States and binds all legislative bodies, courts, and public officers. With such an obligation binding the Attorney General, and with the decision of this court in the *Grogan* and *Anchor Line cases* before him, how could he, mindful of his oath of office, advise the Secretary of the Treasury that he had the power to prepare and promulgate rules and regulations permitting ships to bring to our ports liquor for beverage purposes and openly prepare, within the jurisdiction of the United States, for the gratification by its citizens of exactly those appetites which it was the avowed intent of the Constitution to deny?

II.

Violations of the national prohibition act committed on the high seas and in foreign ports are punishable as offenses against the United States.

If we are right in our contention that the Eighteenth Amendment and the enforcement acts are broad enough in language and intent to make the policy of prohibition effective wherever the jurisdiction of the United States extends, then they apply to American ships on the high seas and in foreign ports. That the jurisdiction of the United States is thus extensive is not open to question. The opinion of the Attorney General which brought about the present controversy covers completely both the question of jurisdiction and the question of its application to American ships under the enforcement acts. It is printed in the appendix hereto and will serve as our argument on this phase of the case, except for the application of the decision of this court in the case of *United States* v. *Bowman*, decided November 13, 1922, after the opinion was given. In passing it may be noted, however, that the jurisdiction asserted is not new, having been recognized in the statutory law of the United States ever since the judiciary act of September 24, 1789.

In the *Bowman case* it was held that section 35 of the Criminal Code relating to conspiracies to defraud the United States applied to such a conspiracy begun on board an American vessel on a voyage from New York to Rio Janeiro. The court below, while admitting the jurisdiction, had held that sec-

tion 35 of the Criminal Code could not be given application to the high seas because wherever Congress had intended such a result it had said so expressly and that the offenses enumerated in the chapter of the Criminal Code which included section 35 did not contain the appropriate and necessary language. This court, however, refused to follow that reasoning and said that—

> the necessary *locus*, when not specially defined, depends upon the purpose of Congress as evinced by the description and nature of the crime and upon the territorial limitations upon the power and jurisdiction of a government to punish crime under the law of nations.

The principle of that case would seem to be this: That when general words are used to define crimes and to provide for their punishment, they will be held to cover offenses wherever committed within the jurisdiction of the United States, if those offenses are such as do not depend for their criminal nature upon the locality where they are committed and are offenses against the peace, security, dignity, or sovereignty of the nation. Of offenses of this class, as distinguished from crimes against individuals and their property, the court said:

> But the same rule of interpretation should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the Government's jurisdiction, but are enacted because of the right of the Government to defend itself against obstruction, or fraud wherever perpetrated, especially if

> committed by its own citizens, officers, or agents. Some such offenses can only be committed within the territorial jurisdiction of the Government because of the local acts required to constitute them. Others are such that to limit their *locus* to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute and leave open a large immunity for frauds as easily committed by citizens on the high seas and in foreign countries as at home. In such cases, Congress has not thought it necessary to make specific provision in the law that the *locus* shall include the high seas and foreign countries, but allows it to be inferred from the nature of the offense.

The court then enumerates many offenses included in chapter 4 of the Criminal Code, which bears the title "Offenses against the operations of the Government." These offenses, in some cases, like the certification of a false invoice by a consul, must clearly be committed in a foreign country. In the case of such offenses as forging or altering a ship's papers it could not be said that because Congress did not fix any *locus* for the crime it intended to exclude the high seas. By the same reasoning it would seem to follow that such offenses as enticing desertions from the naval service, bribing a United States officer, willfully doing any act relating to the bringing in, custody, sale, or disposition of property captured as a prize, with intent to injure or defraud the United States, and stealing or illegally using ordnance, arms, ammunition, etc., furnished or to be

used for military or naval service would not fail to be violations of the statute because committed in foreign countries or on the high seas. The court concludes that section 35 of the Criminal Code, therefore, covered the offenses enumerated when committed on American ships upon the high seas, for it was directed generally against "whoever" did any of the prescribed acts.

If we are correct in our assumption that the purpose of the Eighteenth Amendment was to commit the United States, as a nation, unalterably to the policy of suppressing, with all its power, the drinking of liquor as a beverage in every place to which its jurisdiction extends, and that the enforcement act, as supplemented by the act of November 23, 1921, makes it applicable not only to the United States but to all territory subject to its jurisdiction, it would seem to follow that the general words of the act are sufficient to imply a purpose in Congress to make the acts denounced as criminal punishable wherever committed within the jurisdiction of the United States, including its own ships wherever they may be. It seems to us that there can be no doubt whatever that the act was intended to apply to the ports and littoral waters of the country. Even in the limited sense, they are part of our "territory." The bringing of liquor within our harbors, the storage of it on vessels and the carrying of it thence with open intent to use it for a condemned purpose would plainly constitute a direct menace to the national policy

of prohibition as an internal condition of the country. The notorious difficulties in the enforcement of such laws, combined with the equally notorious difficulty in preventing smuggling, give all too plainly the promise that some of the liquor on board the ships is almost certain to find its way ashore.

While this special argument may not apply to liquor taken on board in a foreign port and used while at sea and in foreign ports, yet the purpose to destroy drinking in all places subject to our jurisdiction remains. Section 20 of the National Prohibition Act, providing for the enforcement of prohibition within the Canal Zone, contains a proviso that the section shall not apply to liquor in transit through the Panama Canal or on the Panama Railroad. From this exception it is argued that Congress did not intend to interfere with the possession and transportation of liquor under circumstances which, in its judgment, did not seem to imperil our national policy. But we are not concerned now with the transportation of commercial cargoes between foreign ports and through a canal which we are bound as a nation to maintain as a free interoceanic highway for the commerce of the world. Our concern is with liquor carried solely to be drunk as a beverage on our ships and with the legality of open bars under our flag. It is no one's business but ours, and we are a dry nation. The case is well stated by Judge Hand, as follows (*International Mercantile Marine Company case*, No. 693, p. 23):

> It would be a curious thing if a country professing under its fundamental law to forbid

the use of intoxicants were to allow them without stint upon ships that sailed under its flag. The only distinction pressed is the disastrous consequences to an American merchant marine if of all ships at sea ours alone are within this ban. In the first place, the discrimination applies only to passenger vessels, which are a small part of any merchant marine. The whole argument is, however, misconceived. The eighteenth amendment involved the destruction at a blow of property values far greater than that of the whole passenger fleet. The motives which directed it disregarded ordinary commercial interests; it was a reform based upon the belief that the use of alcohol was one of the great evils of modern life, against whose utter extirpation no present rights of property might stand. (*National Prohibition cases, supra*, tenth conclusion.) And while a merchant marine may be thought to have a national importance, quite independent of the property involved in it, a court may not imply exceptions in the language of a constitution based upon its estimate of the relative advantages of what it will realize and what it will destroy.

I conclude, therefore, that a ship of American registry at sea or within a foreign port is within the scope of the amendment and of section three, and that the bills must be dismissed.

III.

There is no distinction between cargo and sea stores which would distinguish liquor carried as such from liquor carried as cargo, or which would indicate that liquor carried as sea stores is intended by Congress to be exempt from the provisions of the 18th amendment and the national prohibition act.

The collection act of March 2, 1799, whose provisions were incorporated in the Revised Statutes, has until recently contained the regulations for the manifesting of cargo and sea stores. Section 2806, Revised Statutes, provided that no merchandise should be brought into the United States from any foreign port in any vessel without a manifest in writing of the cargo signed by the master. Section 2807 set forth what must be included in the manifest, and one thing was "an account of the sea stores remaining, if any." Sections 2795, 2796, and 2797 further particularized the requirements in manifesting sea stores in order to prevent the importation of such sea stores. Section 2795 was as follows:

> In order to ascertain what articles ought to be exempt from duty as the sea stores of a vessel, the master shall particularly specify the articles in the report or manifest to be by him made, designating them as the sea stores of such vessel; and in the oath to be taken by such master, on making such report, he shall declare that the articles so specified as sea stores are truly such, and are not intended by way of merchandise or for sale; whereupon the articles shall be free from duty.

By section 2796, if it appeared to the collector that the quantities of articles reported as sea stores were excessive, the collector could estimate the amount of the duty on the excess, which should forthwith be paid on pain of forfeiture. Section 2797 provided that if any articles were found on board as sea stores other than those specified, or if they were landed without a permit, all such articles should be forfeited. Section 2775 reads as follows:

> The master of any vessel having on board distilled spirits or wines shall, within forty-eight hours after his arrival, whether the same be at the first port of arrival of such vessel or not, in addition to the requirements of the preceding section, report in writing to the surveyor or officer acting as inspector of the revenue of the port at which he has arrived, the foreign port from which he last sailed, the name of his vessel, his own name, the tonnage and denomination of such vessel, and to what nation belonging, together with the quantity and kinds of spirits and wines on board of the vessel, particularizing the number of casks, vessels, cases, or other packages containing the same, with their marks and numbers, as also the quantity and kinds of spirits and wines on board such vessel as sea stores, and in default thereof he shall be liable to a penalty of five hundred dollars, and any spirits omitted to be reported shall be forfeited.

It is obvious that sea stores, therefore, have always been treated in our customs laws in the same manner as cargo. They were to be manifested and, if landed

without a permit, forfeited. Liquors as sea stores were covered by special requirements and were to be reported with the other liquors on board.

Nor is it true, as claimed, that sea stores have always been regarded as part of the ship. A ship and the things on board other than passengers' baggage have always been, by the customs laws at least, classified under three heads, (1) the ship, its tackle, apparel, and furniture, (2) its cargo, (3) its sea stores. See sections of the Revised Statutes referred to *supra; United States* v. *24 Coils Cordage*, 28 Fed. Cas. 276; *United States* v. *1 Hempen Cable*, 27 Fed. Cas. 26. In the latter case Judge Davis, in the District court of Massachusetts, considering the customs laws and referring to sea stores, said that the words "sea stores" were applicable "not to the tackle and apparel of the ship, furniture, sails, rigging, cables, or anchors. These are to be considered as attached to the ship and so belonging to the ship that it is no more necessary to include them in the manifest than the ship itself."

The tariff act of 1922, in its later sections, revised the collection act of March 2, 1799, inorporated in the Revised Statutes. By section 642 of the act of 1922 sections 2775, 2795, 2796, 2797, 2806, and 2809 of the Revised Statutes were repealed. The fact that section 2775 was repealed is convincing evidence that Congress did not intend that liquor should be carried either as cargo or as sea stores. This is particularly suggestive when we consider

that, in the later sections of the traiff act of 1922, most of the provisions of the old act of 1799 were reenacted in one form or another with the exception of those which had to do with liquor. Can it reasonably be said that a Congress which revised the old collection act and left out of it all provisions for manifesting liquors, and showed its intention to make the old sections comply with present conditions, intended that liquors might be carried as ships' stores? Nowhere either in the old act or the new is there any limitation upon the amount of merchandise which can be carried as sea stores. Is it reasonable to suppose that Congress intended to allow a vessel to carry as sea stores any amount of liquor which she might choose, to stay in our ports with it as long as she chose, with only a penalty of having it treated as imported merchandise if any of it was landed? It would seem to follow by necessary implication that if Congress, when it passed the tariff act of September 21, 1922, and repealed the provisions of section 2775 of the Revised Statutes specifically providing for reporting liquors forming part of the sea stores of a vessel, had intended to allow such liquors to be included as sea stores, it would have made some specific provision for them, including the amount which might be carried, and carefully drawn safeguards against smuggling.

IV.

Summary and conclusion.

Our construction of the enforcement laws must follow the policy of our country declared in the Eighteenth Amendment. The language of the statutes is broad enough to give complete effect to that policy wherever the jurisdiction of the United States extends. It should therefore be given such effect. That it may cause loss and confusion is evident. That it should upset established custom was its purpose. That it may interfere with development of our cherished merchant marine is deplorable. But if—

> To cut up this mischief by the roots, a mischief which was felt through the United States, and which deeply affected the interest and prosperity of all (4 Pet. 432),

the people made the Eighteenth Amendment a part of their organic law, the courts—

> can listen only to the mandates of law, and can tread only that path which is marked out by duty (4 Pet. 438).

The judgments appealed from, therefore, should be affirmed.

JAMES M. BECK,
Solicitor General.

MABEL WALKER WILLEBRANDT,
Assistant Attorney General.

ALFRED A. WHEAT,
Special Assistant to the Attorney General.

DECEMBER, 1922.

APPENDIX.

POSSESSION AND TRANSPORTATION OF LIQUORS ON AMERICAN AND FOREIGN VESSELS.

DEPARTMENT OF JUSTICE,

October 6, 1922.

SIR: Acknowledgment is made of the receipt of your letter of June 23, 1922, in which you inclosed an opinion of the general counsel of the Shipping Board, holding that the Eighteenth Amendment does not apply to American ships on the high seas and stating that in conformity with said opinion liquor is being furnished for beverage purposes on Shipping Board vessels outside the territorial waters of the United States.

You suggest a reconsideration of the rulings of this Department, particularly the opinion of November 1, 1920, relating to the application of the national prohibition act to American ships on the high seas and request advice from this department whether the practice of selling liquors on American ships outside the territorial waters of the United States is permissible under the law.

You further request this Department to advise you whether under our interpretation of the law and the decisions in *Grogan* v. *Walker* and *Anchor Line* v. *Aldridge*, cases decided by the United States Supreme Court May 15, 1922, the sale, transportation, or possession of intoxicating liquor for beverage purposes on foreign vessels while in American waters is prohibited.

My answer to the first question is in the negative for the following reasons:

The Eighteenth Amendment To the Constitution of the United States provides:

> the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from *the United States and all territory subject to the jurisdiction thereof* for beverage purposes is hereby prohibited.

The fundamental consideration, then, upon which the answer to your first query rests is whether United States ships while on the high seas fall under the legal interpretation of the phrase "the United States and all territory subject to the jurisdiction thereof."

To arrive at the correct legal interpretation of any constitutional provision it is necessary to "read it in the light * * * of the context * * * and the subject with which the amendment dealt and the purpose which it was intended to accomplish * * *" (Chief Justice White, concurring in the *National Prohibition cases*, 253 U. S. 350–390.)

The purpose or intent of the States in adopting the Eighteenth Amendment and that of the legislative body in initiating it must be considered in the light of "the mischief to be prevented" (*Craig* v. *Missouri*, 4 Pet. 410, 431), the subject, the context, and intention of the body inserting the word in the Constitution (*McCulloch* v. *Maryland*, 4 Wheat. 316), "all the aids and lights of contemporary history" (*Kendall* v. *United States ex rel. Stokes*, 12 Pet. 524), "in connection with the known condition of affairs out of which the occasion for its adoption may have arisen * * * in a way, so far as is reasonably possible to forward the known purpose or object for which the amend-

ment was adopted." (*Maxwell* v. *Dow*, 176 U. S. 581.)

The mischief to be prevented in prohibition enactments has been construed as the use of intoxicating liquor as a beverage. (See *Crane* v. *Campbell*, 245 U. S. 304.) A glance at contemporary history and the condition of affairs out of which the adoption of the eighteenth amendment arose compels the admission that it represents the culmination of 50 years' struggle of the American people to effectively settle the problems arising from the use of intoxicating liquor as a beverage. Beginning by county, and State by State, the area wherein the manufacture, sale, and possession of intoxicants were made illegal grew until, by the ratification by 45 of the 48 States of the Union, an amendment affirming and extending such prohibition was added to our Federal Constitution. To hold that the intent of Congress in proposing the wording of the amendment, and of the States in ratifying it, was anything less than to extend its inhibitions wherever the judicial arm of this Government extended for any purpose is to fail to apply all the rules the Supreme Court has laid down for arriving at the intent of constitutional enactments.

The term "all territory subject to the jurisdiction thereof" expresses not a limitation just to lands, as the word "territory" might alone be construed, but rather an extension wherever the jurisdiction of the United States may reach.

Certainly Shipping Board vessels operated and owned by our very Government itself are "subject to the jurisdiction thereof." Because of their ownership by the Government they would, in a double sense, be subject to the restrictions of the Eighteenth

Amendment. But every American vessel is for some purposes regarded as a part of American territory and our laws are the rules for its guidance. (*The Scotia*, 14 Wall. 170, 184.)

> It is often stated that a ship on the high seas constitutes a part of the territory of the nation whose flag it flies. In the physical sense this phrase obviously is metaphorical. In the legal sense it means that a ship on the high seas is *subject to the exclusive jurisdiction of the* nation to which, or to whose citizens, it belongs. The jurisdiction is quasi territorial. (Moore's International Law Digest, vol. 1, p. 930; *U. S.* v. *Rodgers*, 150 U. S. 249.)

Our diplomatic correspondence and the opinions of the courts have uniformly considered that in so far as the restraining and protecting jurisdiction of our Government is concerned, American ships, whether owned by the Government or by private citizens or corporations, are in many respects territory of the United States. Some interesting observations in this connection are:

In the case of *United States* v. *Rodgers* (150 U. S. 249) it is said:

> A vessel is deemed part of the territory of the country to which she belongs.

In the case of *Crapo* v. *Kelley* (16 Wall. 610) the Supreme Court said:

> The question then arises, while thus upon the high seas was she in law within the territory of Massachusetts? * * * This (the Constitution) gives the power to the courts of the United States to try those cases in which are involved questions arising out of maritime affairs, and of crimes committed on the high seas.

In *Lindstrom* v. *International Navigation Company* (117 Fed. 170) the court said:

> The *St. Paul* is an American vessel, registered at the port of New York, and when she was on the high seas was a part of the territory of the State of New York, hence all civil rights of action for matters occurring aboard of her at sea are determined by the laws of that State. (*McDonald* v. *Mallory*, 77 N. Y. 546, 33 American Reports 664; *The Lamington* (D. C.) 87 Fed. 752; *St. Clair* v. *United States*, 154 U. S. 152, 38 L. Ed. 936.)

Mr. Blaine, Secretary of State, in a letter to Mr. Ryan, Minister to Mexico, November 27, 1889 (set forth in Moore's Law Digest, vol. 1, p. 931), says:

> Merchant vessels *on the high seas*, being constructively considered as for most purposes a part of the territory of the nation to which they belong, they are not subject to the criminal laws and processes of another nation.

Mr. Webster, as Secretary of State, spoke for this Government in his letter to Lord Ashburton, August, 1842, as follows:

> It is natural to consider the vessels of a nation as part of its territory though at sea, as the State retains its jurisdiction over them and according to the commonly received custom, this jurisdiction is preserved over the vessels even in parts of the sea subject to a foreign dominion. * * * It is true that the jurisdiction of a nation over a vessel belonging to it, while lying in the port of another, is not necessarily wholly exclusive. We do not so consider or so assert it. For any unlawful acts done by her while thus lying in port, and for all contracts entered into while there, by her master or owners, she and they must, doubtless, be answerable to the laws of the

> place * * * but, nevertheless, the law of nations, as I have stated it, and the statutes of governments founded on that law, as I have referred to them, show that enlightened nations, in modern times, do clearly hold that the jurisdiction and laws of a nation accompany her ships not only over the high seas, but into ports and harbors, or wheresoever else they may be, for the general purpose of governing and regulating the rights, duties, and obligations of those on board thereof, and that, to the extent of the exercise of this jurisdiction, they are considered as parts of the territory of the nation herself. (Webster's Works, vol. 6, pp. 306, 307.)

This case was cited with approval by the United States Supreme Court in the case of *United States* v. *Rodgers* (*supra*).

In the case of *St. Clair* v. *United States*, 154 U. S. 134, 152, the court held:

> A vessel registered as a vessel of the United States, is, in many respects, considered as a portion of its territory, and persons on board are protected and governed by the laws of the country to which the vessel belongs.

Ships are "territory" in a constructive rather than an actual sense. This distinction is clearly shown by Justice Field in *United States* v. *Smiley* (6 Sawyer, 640, 645):

> The criminal jurisdiction of the Government of the United States is limited to their own territory, actual or constructive * * * Their constructive territory embraces vessels sailing under their flag. Wherever they go they carry the laws of their country, and for a violation of them their officers and seamen may be subjected to punishment.

Great stress is laid on the argument that the word "territory" in the Eighteenth Amendment must be construed the same as it was in its use in Article IV, section 3, of the Constitution, and the case of *United States* v. *Gratiot* (14 Pet. 526), is cited to show a construction synonymous with the word "lands." But that the same construction must be given the same word when used in an entirely different context does not follow. (*Cherokee Nation* v. *Georgia*, 5 Pet. 1.) Furthermore, the definition of the word "territory" in the Gratiot case (*supra*) is specifically restricted in its application to the use in Article IV, since the Supreme Court says they interpret the word "territory" only "as here used." It there referred undoubtedly only to lands, because Article IV, section 3, was placed in the Constitution to give the Federal Government authority over the western territory claimed by States under their conflicting sea-to-sea grants. (See Debates in the Constitutional Convention and Watson on the Constitution, vol. 21, p. 1255.)

The construction of the word "territory" in the fourth article of the Constitution to mean lands is in complete harmony with the intent of the framers of that article of the Constitution. I believe from the study of the history of conditions out of which the Eighteenth Amendment grew, it is equally clear that the words "territory subject to the jurisdiction" of the United States carry the intent to extend its provisions over every spot where the flag of America flies.

This intent is a living part of the Eighteenth Amendment and the National Prohibition Act, for, as Justice Brown has said in *Hawaii* v. *Mankichi* (190 U. S. 197, 212):

> Without going back to the famous case of the drawing of blood in the streets of Bologna,

> the books are full of authorities to the effect that the intention of the law-making power will prevail, even against the letter of the statute, or, as tersely expressed by Mr. Justice Swayne in *Smythe* v. *Fiske* (23 Wall. 374, 380): "A thing may be within the letter of a statute and not within its meaning, *and within its meaning*, though not within its letter. *The intention of the lawmaker is the law.*" A parallel expression is found in the opinion of Mr. Chief Justice Thompson of the Supreme Court of the State of New York, (subsequently Mr. Justice Thompson of this court,) in *People* v. *Utica Ins. Co.* (15 Johns, 358, 381): "A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute, is not within the statute, unless it be within the intention of the makers."

It is urged that Acts passed under article 1, section 8, clause 10, of the Constitution, all carry the express provision that they shall apply on the high seas, whereas the National Prohibition Act does not contain such plain extension. But the difference between the two provisions of the Constitution, by authority of which the laws emanate, is material. Article 1, section 8, clause 10, *gives Congress power* to define and punish piracies and felonies committed on the high seas, which offenses by their nature had formerly remained solely in the power of the States to handle. Article 1 of the Constitution prohibited nothing, nor did it define an offense. Of course, therefore, it was necessary for the Act of Congress to define the offense, provide for its punishment, and make provision as to its jurisdiction, since all the regulatory power lay in the congressional enactment, *not* in the constitutional provision. The Eighteenth

Amendment is quite different. It is really a law itself, as well as a declaration of an organic constitutional principle. From its terms alone flows the real prohibition. Palpably, therefore, since by the force of the amendment prohibition is carried everywhere within the confines of the sovereignty of the United States, the National Prohibition Act, passed to facilitate its enforcement and punish its violation, would be coextensive therewith.

The Thirteenth Amendment is similar. It, too, names a new prohibition and states the extent of its application. Enactments resulting from it do not carry specific provision for their application to offenses committed on the high seas, and yet no one would advance the theory that because of that fact slavery might be permitted on American ships while on the high seas. (See sec. 268, Penal Code, also the peonage sections 269, 270, 271 P. C.).

Concerning the self-executing effect of the provisions of the Thirteenth Amendment, the observation of Mr. Justice Bradley in the *Civil Rights cases* (109 U. S. 3, 20) is interesting in the light of its applicability also to the effect of the Eighteenth Amendment.

> This amendment, as well as the Fourteenth, is undoubtedly self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances. By its own unaided force and effect it abolished slavery, and established universal freedom. Still, legislation may be necessary and proper to meet all the various cases and circumstances to be affected by it, and to prescribe proper modes of redress for is violation in letter or spirit.

Another illustration of the application of a provision of the Constitution and laws passed pursuant to

it to the high seas, even though there is no specific reference to the high seas, is found in Article III, section 3, clause 1, of the Constitution, defining treason. It does not indicate the territorial scope of its application, nor do the Acts of Congress passed to enforce it, but in *United States* v. *Greathouse* (4 Savoy, 457) it was held that the purchase and fitting up of a vessel with arms in furtherance of a design to commit hostilities on the high seas constituted treason. (See also *Hawaii* v. *Mankichi*, 190 U. S. 198.)

Section 37 of the Penal Code and other general statutes of the United States, having by their terms no specific extension to the high seas, have been held to extend to violations committed on American vessels outside of American waters.

The same rule has been applied in cases of extradition; for instance, where the treaty has provided that persons will be surrendered who commit crimes within the jurisdiction of the demanding country, the word "jurisdiction" has been held to cover vessels on the high seas. (Moore on Extradition, vol. 1, p. 135, sec. 104 Vogt., 14 Op. 281; Wharton's State Trials, pp. 392, 403, 404; Seale's Cases on Conflict of Laws, sec. 22, p. 506.)

Vessels are taxable as personal property at their home port, although they are actually on the high seas, and have never in fact come within the jurisdiction of the home port. (*People* v. *Commissioner of Taxes*, 58 N. Y. 242; *Olson* v. *San Francisco*, 82 Pac. 850.) Similarly, the pilotage laws (*Wilson* v. *McNamee*, 102 U. S. 572, 574) and the laws concerning assignment (*Crapo* v. *Kelly*, 16 Wall. 610) have such extended operation. It is a recognized principle of law that the State has general civil jurisdiction over

vessels registered at her ports, even where the cause of action arises on the high seas. (*Wilson* v. *McNamee*, 102 U. S. 572; *Manchester* v. *Comm. of Mass.*, 139 U. S. 240; *Crapo* v. *Kelly* (*supra*); *Old Dominion Steamship Company* v. *Gilmore*, 206 U. S. 402, 403.) In the *Old Dominion Steamship Company case* Mr. Justice Holmes in delivering the opinion of the court said:

> In short, the bare fact of the parties being outside the territory, in a place belonging to no other sovereign, would not limit the authority of the State, as accepted by civilized theory. No one doubts the power of England or France to govern their own ships upon the high seas.

The oceans, outside the territorial waters of nations have long been regarded as the highway of all, wherein all nations share the privileges of tenants in common. If, then, the United States shares the high seas as a tenant in common with other nations of the world, the eighteenth amendment would be broad enough to comprehend the sea as territory of the United States in so far as, and where, and when, it is used by American bottoms.

In an early English case, the *King* against *Brizac and Scott* (4 Easts Term Reports, 164), it is held that "an information for conspiracy * * * for planning and fabricating false vouchers to cheat the Crown, which planning and fabricating were done on the high seas, is well triable in Middlesex." (Quoting from the headnote.)

In Corpus Juris, Vol. XVI, under the heading "Criminal Law," page 169, paragraph 216, it is said:

> In the absence of a statute, the courts of a country have not jurisdiction of an offense committed on the high seas except in the case

> of piracy, *unless the offense is committed on board a ship belonging to that country.* (Italics ours.)

An examination of the National Prohibition Act by itself leads to the conclusion that its operation is extended to American vessels on the high seas, since its terms are absolutely general and have no limits of any sort. The only objection is that crimes on the high seas are all dealt with in chapters 11 and 12 of the Criminal Code, but the peculiar language of the relevant section, 272, Penal Code, is significant. All it says is that the crimes and offenses named in the chapter shall be punished when committed on the high seas. It then lists certain ordinary common-law offenses, such as murder, over which of course the Federal Government would not ordinarily by virtue of its limited powers have any jurisdiction whatsoever. There is no intimation in section 272 that no other crimes and offenses except those defined in chapter 11 shall be punished when committed on American vessels on the high seas, and especially is there no suggestion that offenses which violate the avowed constitutional policy of the Federal Government itself shall be so exempted from punishment. On the contrary, the grant in section two of the Eighteenth Amendment of concurrent power to the States and to the Federal Government to enforce the provisions of section 1 thereof would justify the reasonable conclusion that the Federal enactment passed pursuant thereto reached to the jurisdictional limits of other Federal laws. The provisions of the Criminal Code generally apply to the same territory over which the Judicial Code gives jurisdiction to the United States courts, and section 41 of the Judicial Code provides:

> The trial of all offenses committed upon the high seas * * * shall be in the district

where the offender is found, or into which he is first brought. (See *Pederson et al.* v. *United States*, 271 Fed. 187.)

The Shipping Board has frequently sought to punish offenses committed against its property on the high seas by maintaining the applicability of general criminal statutes, such as section 37 and section 35 of the Penal Code of the United States, to crimes committed on the high seas. (See *United States* v. *Hawkins*, So. Dist. of N. Y.; also *United States* v. *Bowman et al.*, now pending in the Supreme Court of the United States, Docket No. 69.) It would be inconsistent for American vessels to enjoy the protection of laws of general jurisdiction and fail to be governed by the prohibitions of one of similar jurisdiction.

In the case of *United States* v. *254 Bottles of Intoxicating Liquors* (Southern District of Texas, May 4, 1922) the court announces that "the sole question for decision is, Had the master the right to possession of the goods on board ship (of United States) on the high seas and was this possession in violation of the National Prohibition Act?" And then holds that such possession was a violation of the law, for which the stores were forfeitable and the owner liable to punishment.

The case of *Scharrenberg* v. *Dollar Steamship Company* (245 U. S. 122) is greatly relied upon by shipping interests as authority that an American ship is not in any sense a part of the territory of the United States. It was a case based on an alleged violation of an act of Congress by which it was a misdemeanor to assist contract laborers *into the United States.*

A contract laborer was defined as one who comes to perform labor *in this country.* Clearly, the phrases

"into the United States" and "into this country" are narrower in extent than "the United States and all territory subject to the jurisdiction thereof." Had the Eighteenth Amendment stopped after prohibiting the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from *the United States*, the cases would be similar, but the Eighteenth Amendment goes further and says "and all territory subject to the jurisdiction thereof." We are led inevitably, therefore, to the conclusion that after the prohibition *in the United States* (which to that point is analogous to the statute considered in the Dollar Steamship Company case) the phrase "and all territory subject to the jurisdiction thereof" was added to extend the scope of the amendment to the very limits of national jurisdiction and sovereignty.

My answer to your second question is in the affirmative.

It is a long-established principle of municipal and international law that a nation has the right to make and enforce laws covering its territorial waters as well as its land. In *United States* v. *Dickelman* (92 U. S. 520, 525), Mr. Chief Justice Waite states:

> The merchant vessels of one country visiting the ports of another for the purposes of trade subject themselves to the laws which govern the port they visit, so long as they remain. (See also Moore's International Law Digest, Vol. II, 275, et seq.)

In 1885, Mr. Bayard, Secretary of State, wrote to the French Minister as follows:

> A foreign merchant vessel going into the port of a foreign State subjects herself to the laws of that State and is bound to conform to its commercial as well as to its police and other

regulations during the period of her stay there. "She is as much a *subditus temporaneous,*" remarks Sir R. Phillimore with reference to such a case, in *The Queen* v. *Keyn* (2 Ex. D. 82), "as the individual who visits the interior of the country for the purposes of pleasure or business." (Moore's International Law Digest, Vol. II, p. 308.)

It is part of the law of civilized nations that when a merchant vessel of one country enters the ports of another for the purposes of trade, it subjects itself to the law of the place to which it goes, unless by treaty or otherwise the two countries have come to some different understanding or agreement; for, as was said by Chief Justice Marshall in *The Exchange* (7 Cranch, 116, 144), "it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such * * * merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country." (*United States* v. *Diekelman*, 92 U. S. 520; 1 Phillimore's Int. Law, 3d ed. 483, sec. 351; Twiss Law of Nations in Time of Peace, 229, sec. 159; Creasy's Int. Law, 167, sec. 176; Halleck's Int. Law, 1st ed. 171.) And the English judges have uniformly recognized the rights of the courts of the country of which the port is part to punish crimes committed by one foreigner on another in a foreign merchant ship. (*Regina* v. *Cunningham*, Bell C. C. 72; S. C. 8 Cox C. C. 104; *Regina* v. *Anderson*, 11 Cox C. C. 198, 204; S. C. L. R. 1 C. C. 161, 165; *Regina* v. Keyn, 13 Cox C. C. 403, 486, 525; S. C. 2 Ex. Div. 63, 161, 213.) As the owner has voluntarily taken his vessel for his own private purposes to a place within the dominion of a government other than his own, and from which he seeks protection during his stay, he owes

> that government such allegiance for the time being as is due for the protection to which he becomes entitled. (*Wildenhus's Case*, 120 U. S. 11, 12.)

If then the bringing in of liquors by foreign vessels as ship stores or otherwise constitutes a transportation or possession contrary to the eighteenth amendment and the national prohibition act, it is clearly a violation of the law that no executive or administrative officer of the Government has the power to permit.

The Constitution prohibits transportation which has been defined as "the taking up persons or property at some point and putting them down at another." (*Gloucester Ferry Company* v. *Comm. of Pa.*, 114 U. S. 196, 203.) That the innocence of any intent to "put them down" or use them *in* the United States is not material in determining whether the transportation is a violation of the law is determined by the *Walker* and *Anchor Line cases* (*supra*), where the court decided that intoxicating liquor stored on one British ship could not lawfully be removed to another British ship in the New York Harbor, although it was admittedly destined for beverage uses outside the United States.

Furthermore, the National Prohibition Act prohibits possession as well as transportation of intoxicants for beverage purposes, irrespective of where they are to be put to such beverage use. Under the reasoning of the court in the *Walker* and *Anchor Line cases* (*supra*), it is no argument for the legality of foreign ships possessing and transporting intoxicating liquors in and across our waters, that they do not intend to use the liquors until after leaving the jurisdiction of the United States, for the court said in that connection:

> The Eighteenth Amendment meant a great revolution in the policy of this country, and presumably and obviously meant to upset a good many things on as well as off the statute book. It did not confine itself in any meticulous way to the use of intoxicants in this country * * *. It is obvious that those whose wishes and opinions were embodied in the amendment meant to stop the whole business. They did not want intoxicating liquor in the United States and reasonably may have thought that if they let it in, some of it was likely to stay. When, therefore, the amendment forbids not only importation into and exportation from the United States but transportation within it, the natural meaning of the words expresses an altogether probably intent. The prohibition act only fortifies in this respect the interpretation of the amendment itself. The manufacture, possession, sale, and transportation of spirits and wine for other than beverage purposes are provided for in the act, but there is no provision for transshipment or carriage across the country from without. When Congress was ready to permit such a transit for special reasons, in the Canal Zone, it permitted it in express words. (Title III, sec. 20; 41 Stat. 322.)

Are we then to argue that such inflexible provisions of law, declared by our Supreme Court as the constitutional policy of our country, shall apply to our own citizens, but be abandoned when we deal with ships of a foreign nation? To do so would be a grievous surrender of our sovereignty. And it is outside the province of an executive or administrative officer of the Government to read into the law and the Constitution an exception not specifi-

cally contained therein. Particularly should it be avoided when the results of granting the privilege to foreign ships would be to produce manifestly unfair conditions of competition for our own citizens and shipping interests. Chief Justice Marshall puts the situation clearly in "*The Exchange*" (7 Cranch 135, 143):

> The jurisdiction of the Nation, within its own territory, is necessarily exclusive and absolute; it is susceptible of no limitation not imposed by itself. * * * When private individuals of one nation spread themselves through another, as business or caprice may direct, mingling indiscriminately with the inhabitants of that other, or when merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the Government to degradation, if such individuals or merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country. Nor can the foreign sovereign have any motive for wishing such exemption. His subjects thus passing into foreign countries, are not employed by him, nor are they engaged in national pursuits. Consequently, there are powerful motives for not exempting persons of this description from the jurisdiction of the country in which they are found, and no one motive for requiring it. The implied license, therefore, under which they enter, can never be construed to grant such exemption.

Again in *The Eagle* (18 Wallace, 15, 22) the Supreme Court holds that—

> All vessels entering into, or departing from, a domestic or foreign port are bound to obey

> the laws and well-known usages of the port, and are subject to seizure and penalties for disobedience; and when submitting to them, they are entitled to all the protection which they afford.

The court carefully considered this whole question in the *Walker* and *Anchor Line cases* and went so far as to hold that the Eighteenth Amendment and the National Prohibition Act repealed a prior existing treaty with Great Britain.

Prior to the sweeping and comprehensive construction placed upon the prohibition law in those cases, it might possibly have been arguable whether liquors forming a part of the ship stores on vessels within territorial waters might be regarded as an implied exception to the National Prohibition Act. Whatever doubts that may have previously existed, have been swept away by the language of the majority opinion in those cases. It is true that this decision was rendered by a divided court, but the dissenting opinion clearly sets forth the arguments that must have been carefully weighed before the majority opinion was rendered. It included a consideration of such arguments as "this country does not undertake to regulate the habits of people elsewhere" and "it has no interest in meddling with transportation across its territory if leakage in transit is prevented." But the very vigor of the dissenting opinion, in which three judges joined, simply emphasized the sweeping character of the majority opinion by which I feel I am bound in deciding this question.

I am, therefore, of the opinion that the Eighteenth Amendment and the National Prohibition Act prohibit as unlawful the possession and transportation of beverage liquors on board foreign vessels while in our

territorial waters, whether such liquors are sealed or open.

By way of summary, therefore, I am of the opinion that under the rules of fair intendment American ships wherever they may be are included in the terms of the Eighteenth Amendment, "territory subject to the jurisdiction" of the United States, so that manufacture, transportation, or sale of intoxicating liquors for beverage purposes is prohibited thereon. To construe otherwise would, in my opinion, violate the unmistakable intent in its adoption, such intent clearly adduced from a study of the circumstances out of which it grew, and voiced by the Supreme Court in the *Walker* and *Anchor Line cases*.

This interpretation is further supported by the many authorities that have held ships to be "constructive territory" of the country whose flag they fly. Such decisions undoubtedly extend the protection as well as the inhibitions of the country's laws.

The National Prohibition Act is an act of general jurisdiction in force wherever the Eighteenth Amendment applies; and the courts of the United States have jurisdiction to punish its violations on the high seas.

I am forced to the opinion, under the ruling of the *Walker* and *Anchor Line* decisions (*supra*), that foreign ships carrying intoxicating beverage liquors as ship stores or otherwise, within the 3-mile limit of our shores, are violating the provisions of the National Prohibition Act, prohibiting possession or transportation of intoxicating liquor for beverage purposes. The Supreme Court therein has held that it is not material that the liquors may not be intended for beverage uses within the United States, because the court emphasized that the Eighteenth Amendment marks a revo-

lution in our former national policy toward intoxicating liquor and does not confine its prohibition in any meticulous way within the United States, but on the contrary its intent was as far as possible to "stop the whole business."

Respectfully,

HARRY M. DAUGHERTY.

To the SECRETARY OF THE TREASURY.

○

SYNOPSIS OF POINTS.

SECOND POINT.

INDEX OF CASES, STATUTES AND DEPARTMENTAL DECISIONS.

Cases.

CONSTITUTION AND STATUTES

SUPREME COURT OF THE UNITED STATES.

INTERNATIONAL MERCANTILE MARINE COMPANY, *Appellant.* *against* H. C. STUART, Acting Collector of Customs for the Port of New York, RALPH A. DAY, Federal Prohibition Director for the State of New York, JOHN D. APPLEBY, Chief Zone Officer, and WILLIAM HAYWARD, United States Attorney for the Southern District of New York, *Respondents.*	October Term, 1922. No. 693.

BRIEF ON BEHALF OF APPELLANT.

This case comes before the Court on a direct appeal taken by the complainant below under Section 238 of the Judicial Code, from a decision and decree of the Honorable Learned Hand in the United States District Court for the Southern District of New York in which he dismissed a bill in equity involving the construction of the Eighteenth Amendment of the Constitution of the United States, its applicability to vessels of the United States

and the constitutionality of the National Prohibition Act as applied to such vessels.

The bill was brought by the International Mercantile Marine Company, as owner of the American steamships *St. Paul, Finland* and *Kroonland,*—which were all registered as vessels of the United States under Revised Statutes 4131-4132, and engaged in passenger trade between ports of the United States and foreign ports, principally in Belgium—to secure a permanent injunction preventing the threatened enforcement against the complainant and its vessels by the defendants, their agents, servants, subordinates and employees of the penalties of the National Prohibition Act. *Bill of Complaint,* pp. 1-7.

The bill prayed that the defendant should be restrained,

A. From interfering in any manner whatsoever—

1. With the arrival or departure of the complainant's vessels with intoxicating liquor on board, sealed as sea stores.

2. With the peaceful possession of intoxicating liquors on board complainant's vessels as part of their sea stores.

B. From inflicting any seizures, forfeitures or penalties against the complainant or its vessels by reason of any alleged violation of the National Prohibition Act, based on the ground—

1. That the ships of the complainant have intoxicating liquors on board, sealed as sea stores while in the ports of the United States, or

2. That there have been sales of liquor, carried as sea stores, made on the high seas or in foreign ports on complainant's vessels.

There was also the usual general prayer for such relief as the complainant may justly be entitled to receive. *Record*, pp. 6-7.

Copies of the Treasury decisions construing the Act so far as sea stores were concerned and exempting them from its operation were annexed to the bill of complaint. *Record*, pp. 8-9.

The relief sought in the bill was broad enough to leave vessels of the United States free to deal with the question of intoxicating liquors in the same manner as they had been expressly authorized to deal with such liquors, since the enactment of the National Prohibition Act, by the construction which had theretofore been put on said Act by the Government.

A temporary restraining order was granted with an order to show cause returnable October 14, 1922, why a permanent injunction should not be granted. *Record*, pp. 10-11.

A general appearance and answer were filed by the defendants, which took issue with the complaint on the principal ground that the threatened actions of the de-

fendants would not interfere with the complainant's constitutional rights. *Record,* pp. 15, 17-18.

An additional affidavit by Mr. John H. Thomas was filed before the hearing in pursuance of the leave given in Section 2 of the order to show cause. *Record,* pp. 10, 12.

Mr. Thomas' affidavit, showed that under Belgian Government Regulations twenty bottles of claret for every 100 emigrants was required, and that under the British Board of Trade Regulations, one gallon of brandy for every 100 passengers was required on foreign flag steamers clearing from British ports with British passengers on board. *Record,* p. 16.

The case came on to be heard at the same time as similar bills of complaint brought by various foreign steamship companies.

Judge Hand ruled in his first opinion that as a question of practice the allegations of the bill of complaint in this case with regard to threatened prosecutions for sale on the high seas and in foreign ports were not strong enough properly to raise the question as to the right of American vessels to have on board and sell liquor on the high seas. *Record,* p. 30.

As it was intended by both parties to raise this question, the bill of complaint was accordingly amended by stipulation. *Record,* p. 19.

Thereupon Judge Hand rendered a second opinion in which he dealt with the question raised by the amendment in the bill of complaint, and in the two opinions he ruled on the whole question of the applicability of the Eighteenth Amendment and the National Prohibition

Act to vessels of the United States on the high seas and in foreign and domestic waters.

In Judge Hand's first opinion, rendered October 23, 1922, he dealt with the question of carriage of liquor as sea stores within the territorial waters of the United States both by foreign vessels and vessels of the United States.

He held that, although sea stores were commonly treated as part of a vessel, and although vessels were not mentioned in the Amendment or the National Prohibition Act, they were covered by the literal meaning of the Amendment and the Act; and that, in view of the broad purpose of reform involved in the Amendment and its enforcing legislation, there should not be any implication of an exception of vessels or sea stores because the implication of an exception from a statute which literally covers a situation depends on the circumstances involved and the purpose of the legislation. In this case he held the legislation was intended to be all inclusive. *Record,* pp. 27-32.

Therefore he held that sea stores of liquor kept on board vessels whilst moving within the territorial waters of the United States were being transported contrary to the prohibitions of the Amendment and the National Prohibition Act. *Record,* pp. 26-27.

After this first decision had been rendered and the amendment of the bill of complaint above referred to had been made, there still remained the question to be decided as to whether the Eighteenth Amndment and the National Prohibition Act applied to vessels of the United States on the high seas and within foreign ports.

Judge Hand rendered his opinion on this point on October 26, 1922, and held that the provisions of the Eighteenth Amendment, prohibiting the sale of intoxicating liquors for beverage purposes within "the United States and all territory subject to the jurisdiction thereof," involved a prohibition by the Constitution of the sale of liquor on American ships on the high seas and in foreign ports on the ground that ships are treated metaphorically for most purposes by our municipal law and by international law as part of the territory of the country whose flag they fly. *Record*, pp. 20-24.

In pursuance of these opinions, Judge Hand made a final decree dismissing the amended bill of complaint, and, at the same time, he made certain provisions for staying prosecution of the complainant in respect of intoxicating beverages kept on board as sea stores under the requirements of the foreign laws above mentioned. *Record*, p. 33.

An immediate appeal was taken, *Record* p. 34, and errors assigned which raise the question of the construction of the Eighteenth Amendment and the application of that Amendment and of the National Prohibition Act to vessels of the United States while in our territorial waters, on the high seas and in foreign ports. *Record*, pp. 34-36.

On November 13, 1922, the complainant made a motion before this Court to advance the case. This motion was granted on November 20th, and the case was assigned by this Court for argument on Tuesday, January 2, 1923.

FIRST POINT.

THE DISTRICT JUDGE ERRED IN HOLDING THAT INTOXICATING LIQUORS WHICH HAVE BEEN LEGALLY ACQUIRED AND WHICH ARE KEPT ON AND USED ONLY AS SEA STORES BY VESSELS OF THE UNITED STATES ARE WITHIN THE PURVIEW OF THE EIGHTEENTH AMENDMENT.

1. *Sea stores are consumable provisions kept on board a vessel as part of her equipment for the maintenance of her passengers and crew.*

The nature of sea stores has been the subject of decision under general maritime law in England, of legislation by Congress and of both Court and Departmental decisions in the United States.

Sea stores have always been recognized as an inherent and essential part of the vessel on which they were kept and as falling within the definition above given to them.

A. *General Maritime Law and Practice.*

In *Brough* v. *Whitmore*, 4 Term Reports 206 (1791), it was held that provisions sent out in a ship for the use of her crew were protected by a policy of insurance on the ship and furniture.

It appeared that whilst the ship was lying in the River Canton, it became necessary to refit her, for which purpose the stores and provisions were taken out and put into a warehouse. Whilst in the warehouse, the stores were destroyed by accidental fire.

It was admitted by the insurers that the policy covered all the articles except the provisions for the use of

the ship's crew and the point was that if these provisions were not protected by the policy there was not an average loss of £3 per cent. and hence the policy was not opened up for a recovery.

Thus the flat question came up to be decided whether sea stores were a part of the vessel and her furniture or not. The plaintiffs obtained a verdict and a rule to show cause why a new trial should not be granted was entered.

This rule came on to be heard before Lord Chief Justice Kenyon, Mr. Justice Ashurst, Mr. Justice Buller and Mr. Justice Grose, and it was held unanimously that provisions were part of the ship.

Mr. Justice Buller said, 4 Term Reports, at page 210 (Italics ours):

> "* * * Now it is perfectly clear that in every instance where losses have been settled, *the provisions put on board the vessel when she sailed have been considered as part of the ship. The value is taken in this way; the underwriters have a right to go and see the ship, to examine the value of the hull, the masts, and the provisions; the value of the ship alone comprehends all these articles:* * * *."

Accordingly the rule for a new trial was unanimously discharged.

In the case of *The Dundee*, 1 Hagg. Adm. 109 (1823), Lord Stowell had to decide whether fishing stores of a vessel engaged in the Greenland Fisheries were appurtenances of the ship within the meaning of 53 George III, c. 159, which restricted the liability of a shipowner in case of loss to the value of the ship, her tackle, apparel, furniture, freight and appurtenances.

At page 126, Lord Stowell said (Italics ours):

> "It may not be a simple matter to define what is, and what is not, an appurtenance of a ship. There are some things that are *universally* so—things which must be appurtenant to every ship, *qua* ship, be its occupation what it may. *But, I think, it is rather gratuitously assumed that particular things may not become so from their immediate and indispensable connection with a ship, in the particular occupation to which she is destined, and in which she is engaged. A ship may have a particular employment assigned to her, which may give a specialty to the apparatus that is necessary for that employment.* * * * The word 'appurtenances' must not be construed with a mere reference to the abstract naked idea of a ship; for that which would be an incumbrance to a ship one way employed, would be an indispensable equipment in another, and it would be a preposterous abuse to consider them alike in such different positions. *You must look to the relation they bear to the actual service of the vessel.* * * *."

Accordingly he held that the value of the stores must be included in the limitation fund, and application was made to the King's Bench for a prohibition declaration.

The decision was approved in the Court of King's Bench *sub nomine Gale* v. *Laurie*, 5 B. & C. 156 (1826), where it came up on the declaration in prohibition.

Lord Chief Justice Abbott, afterwards Lord Tenterden, who was the author of the first great modern book on shipping law—Abbott's *Law of Merchant Shipping*,—said, 5 B. & C., at page 164 (Italics ours):

"* * * *The fishing stores were not carried on board the ship as merchandise but for the accomplishment of the objects of the voyage; and we think, that whatever is on board a ship for the object of the voyage and adventure on which she is engaged, belonging to the owners, constitutes a part of the ship and her appurtenances within the meaning of this Act, whether the object be warfare, the conveyance of passengers or goods, or the fishery.*

"This construction furnishes a plain and intelligible general rule; whereas, if it should be held that nothing is to be considered as part of the ship that is not necessary for her navigation or motion on the water, a door would be opened to many nice questions, and much discussion and cavil."

In the English Marine Insurance Act of 1906, which is a codification of the maritime law and practice on the matter of marine insurance, the insurable value of the ship is thus stated in Section 16 of the Act, which can be found as Appendix A at page 1659, Volume II, of the Tenth Edition of Arnould on *Marine Insurance.*

Section 16 of the Act reads as follows (Italics ours):

"* * *

"(1) In insurance on ship, the insurable value is the value, at the commencement of the risk, of the ship, including her outfit, *provisions and stores for the officers and crew*, money advanced for seamen's wages, and other disbursements (if any) incurred to make the ship fit for the voyage or adventure contemplated by the policy, plus the charges of insurance upon the whole:

"The insurable value, in the case of a steamship, includes also the machinery, boilers, and

coals and engine stores if owned by the assured, *and, in the case of a ship engaged in a special trade, the ordinary fittings requisite for that trade:*"

A further proof of the incorporation of sea stores into the ship as an essential part of her is the fact that they are valued by surveyors when valuing the ship for general average contribution as part of the contributory value of the ship.

In Lowndes on *General Average,* which is one of the best known of all books on General Average, the following rule is laid down in Section 76, page 375, fifth edition (Italics ours):

"The ship, the cargo, and the freight, constitute, generally speaking, the whole of the property on shipboard liable to contribute to general average. Should there be any kind of property, not coming under any of these heads, which is preserved from destruction by a general average act, this likewise must contribute, unless there be some special reason for exempting it. * * * Everything which is covered by an ordinary policy of insurance on the ship, *that is to say, her appurtenances of every kind, including the provisions laid in for the voyage and unconsumed at the end of it, is brought into contribution as included in the value of the ship.* If there be anything else on shipboard, not constituting merchandise in the proper sense of the word, yet possessing a substantial value, it ought to contribute. *For example, the unconsumed stores of a troop ship, or those laid in by a passenger charterer;* planks or

other materials used as dunnage, or covering-boards, or for the construction of temporary bulk-heads for cargo, or the like, should properly be brought in as contributing. It is only the small value of such articles which occasions their being, in practice, frequently disregarded."

It is also a very interesting fact that in the case of many European nations a separate list of ship's stores is considered as part of the ship's papers in addition to the ordinary cargo manifest. Atherly Jones on *Commerce in War*, pages 347-352.

B. *Statutes passed by Congress.*

Under the general requirements as to the manifest which must be made by masters of vessels coming into the United States, with merchandise from any foreign port, there was a provision that there must be made "An account of the sea stores remaining, if any." *Revised Statutes*, Sec. 2807, as amended by the Act of June 3, 1892.

In *Revised Statutes*, Sec. 2775, enacted first on March 2, 1799, and later amended May 1, 1872, there is a provision requiring a special report of spirits and wines on board vessels coming into our ports. This Statute, after providing for a special report as to spirits and wines on board as cargo, proceeds to provide that the master should report also the quantity and kinds of spirits and wines on board such vessel as sea stores.

In the Act of March 2, 1799, Chapter 22, Section 45, Revised Statutes 2795, there is a provision that the mas-

ter shall specify his sea stores when he comes into port. The purpose of this provision was that the precise nature and extent of such provisions may be known and their immunities established.

The Tariff Act of 1922 repealed all the sections above referred to regarding the manifesting of ship stores, sea stores, and merchandise, *Tariff Act of 1922*, Section 641, and re-enacted new provisions for the manifesting of sea stores which, although they did not specifically mention liquor as sea stores, did not exclude it. *Tariff Act of 1922*, Sections 431 and 432.

It is significant that in Section 584, there is a specific provision for punishment of the master and a lien on the vessel in the event that opium prepared for smoking which has not been manifested is found on board; but that there is not among the administrative provisions of the Tariff Act of 1922, any mention of intoxicating liquors or any provision excluding such liquors as improper sea stores.

There is not in the debates of Congress leading up to the enactment of the Tariff Act of 1922 any mention of any intention to exclude liquor from sea stores of vessels. The object of the amendment was apparently merely to recodify and simplify the law as to manifests.

C. *Court Decisions in the United States.*

The question of sea stores and their relation to the manifest under the early Statutes above-mentioned, was discussed by Mr. Justice Baldwin, sitting on Circuit, in the case of *United States* vs. *Twenty-four Coils of Cordage*, 28 Fed. Cas. 276; *Baldwin*, 502 (1832).

Mr. Justice Baldwin said on page 279:

> "* * * It directs a manifest of the cargo to be made out, together with the name or names of the passengers, distinguishing whether cabin or steerage passengers, or both; their baggage and packages belonging to each, together with an account of the remaining sea stores, if any.' To the question, what are such sea stores? a plain answer is furnished; such articles of provision and stores, as were put on board by the captain or passengers, and not consumed on the voyage, but remaining on hand at its termination. The words 'vessel and cabin stores' in the form of the manifest are not inserted for the purpose of introducing any distinct class or kind of sea stores, but merely as the head under which those designated in the preceding part of the section should be entered on the manifest, as the 'remaining sea stores.' These views of the law are very fully apparent in the thirtieth section, prescribing the form and requisites of the oath of the master to the manifest. 'And I do further swear, that the several articles specified in the said manifest as the sea stores for the cabin and vessel, are truly such, and were bona fide put on board for the use of the officers, crew and passengers thereof; and are intended to remain on board, for the consumption of said officers and crew.' If the ship has on board wines, spirits or teas, the captain is, by the same section, required to report the quantity and kind on board, as sea stores, to enter them in the manifest under that head, and to superadd his oath, as in the case of other sea stores on board."

In the case of *United States* vs. *One Hempen Cable and One Hempen Hawser,* 27 Fed. Cas. 264 (1831), Judge

Davis, in the District of Massachusetts, in construing the Customs Laws, spoke of sea stores as follows, at page 265:

> "* * * 'Vessel and cabin stores', is the expression in the 23d section of the collection law; in the 45th Section, it is 'sea stores of a ship or vessel.' These expressions are understood to mean, and naturally do mean, the stores or provisions laid in for cabin or steerage, for officers, passengers or crews, or if further extended, can only be applicable to articles of consumption, perishing in the using, and not to the tackle and apparel of the ship, and sails, rigging, cables or anchors. These are to be considered as attached to the ship, and so belonging to the ship that it is no more necessary to include them in the manifest than the ship itself."

It was held in *United States* vs. *Hawley & Letzerich*, 160 Fed. 734, that coal was not sea stores and the following definition of sea stores was given by Judge Burns in reviewing a decision of the Board of General Appraisers, at page 739:

> "The sole question for review as disclosed by the pleadings and relied upon in the argument is whether or not 'coal' is a part of the sea stores of the vessel. 'Sea stores' are defined in Commercial Navigation as 'the supplies of different articles provided for the subsistence and accommodation of the ship's crew and passengers.'
>
> "It follows, therefore, that coal being no part of the vessel's sea stores, the petition for review should be sustained, the decision of the board reversed, and the action of the collector of customs in all things affirmed."

In fact liquors are "necessaries" for a vessel in the ocean passenger trade.

The question whether liquors were necessaries for a vessel after having been decided both ways, came up before Judge Dodge in the District Court of Massachusetts in the case of *The Satellite,* 188 Fed. 717 (1910). He discussed the opposing decisions and came to the conclusion that in the case before him liquors were necessaries and that in each case whether they were necessaries or not was to be determined by the character of the employment of the vessel. He said at page 720 (Italics ours):

> "There is no doubt that in determining what supplies are necessaries regard must be had to the character of the voyages or the employment in which the vessel is being used, nor that a more inclusive construction of the term has had to be adopted, as the uses to which vessels are put and the purposes for which they are employed have come to be more various in character. If she is employed in carrying passengers, part of the profits from her employment is, of course, obtained by supplying passengers' wants during the voyage. The longer the voyage and the more passengers carried, the greater will be the variety in kind of the articles which must be furnished to her for this purpose. The decision in *The Plymouth Rock,* 13 Blatchf. 505, Fed. Cas. No. 11,237, that supplies for use in the restaurant on board a passenger steamer were necessaries, has never been, nor do I see how it could be, questioned. At least in cases like *The Long Branch,* above cited, where the voyages made were only of a few hours' duration, it might be possible to say that it is optional with

the owner whether to maintain a restaurant on board or not; but the probability that, if he did not, he would get fewer passengers to carry, seems to me to meet this objection. If passengers are carried, whatever may be reasonably supposed to meet the ordinary wants of the class of passengers expected must, I think be necessaries, whether strictly essential to their safety and comfort or not. Judged by this test, I think the liquors furnished by the libelant may fairly be called necessaries. The *J. S. Warden* (D. C.) 175 Fed. 314, a recent decision by Judge Hand in the New York Southern District, tends to confirm this conclusion. It was there held that the services of a bartender rendered on board a passenger-carrying vessel are maritime and secured by a lien on the vessel, because they are in aid of the purposes of the voyage, notwithstanding the earlier decisions that the only services on board which confer a lien are such as aid in the navigation or preservation of the ship. I hold, therefore, that the libelant acquired a lien under the state statute."

D. *Departmental Decisions.*

An opinion, rendered by the Honorable Richard Olney on December 1, 1894, to the Secretary of the Treasury, involved the question of refund of duties on certain coal which had been withdrawn from a warehouse for the purpose of fueling ocean steamers.

The contention of the applicants for the refund is embodied in the Attorney General's opinion, *21 Opinions of the Attorney General*, 92. At page 93, Mr. Olney gave the following definition of sea stores:

"It is claimed by the applicant that the coal is within this proviso, because it is 'not merchandise,' and they base this claim mainly on an argument that it can not be merchandise because, having been withdrawn for use in fueling ocean steamers, it comes within the class of 'sea stores.' This claim, however, is based upon a misunderstanding. 'Sea stores,' in our tariff legislation, are the stores contained in incoming vessels which are necessary for their use for the purposes of the voyage. These stores are plainly enough merchandise when purchased, and they are so treated by the statutes (Rev. Stat., sec. 3111) until put aboard ship. They then become, practically speaking, part of the equipment of the ship, which equipment, like the ship itself, is exempt from duty, because, though personal property, it is not regarded as an import. (*The Conqueror*, 49 Fed. Rep. 99, 103, 105.) This seems to have been assumed from the very beginning of our Government, it being taken for granted that sea stores were exempt from duty even before they were expressly made exempt. The name was always restricted to articles which, brought into port aboard ship, were to be consumed aboard or carried off again on the outward voyage; or, if put ashore at all, landed only for the convenience of the ship itself. (See Act of August 4, 1790, chap. 35, sec. 22; Act of Mar. 2, 1799, chap. 22, sec. 45; Rev. Stat., secs. 2795, 2796, 2797.) Articles do not become 'sea stores' until they have thus become part of the ship's equipment."

It was, therefore, in pursuance of a long applied doctrine of sea law and a consistent legislative policy that since the adoption of the Eighteenth Amendment and the passage of the National Prohibition Act, the Treas-

ury Department promulgated the regulations governing sea stores of liquors which are now in force.

These regulations represent the construction heretofore placed by the Government on the Eighteenth Amendment and on the National Prohibition Act in relation to foreign vessels and vessels of the United States in foreign trade.

Under these regulations the Eighteenth Amendment and the National Prohibition Act are held not to be applicable to intoxicating liquor carried as sea stores on American or foreign vessels within our territorial waters.

This construction by the Government, made when the statute was first passed and continued for over a period of three years, is a clear indication of the intention of Congress in passing the Act and is a most conclusive argument in support of the contentions made herein by Appellant.

The Treasury regulations referred to are as follows:

> Treasury Decision 38218.
>
> "SEA STORES—LIQUORS
>
> "Liquors properly listed as sea stores should be kept under seal while vessels are in port. Excessive or surplus quantities should be seized and forfeited.—Articles 106 and 107 of the Customs Regulations of 1915 amended.

"Treasury Department,
December 11, 1919.

"To Collectors of Customs and Others Concerned

"All liquors which are prohibited importation, but which are properly listed as sea stores on vessels arriving in ports of the United States, should be placed under seal by the boarding officer and kept sealed during the entire time of the vessel's stay in port, no part thereof to be removed from under seal for use by the crew at meals or for any other purpose.

"Excessive or surplus liquor stores are no longer dutiable, being prohibited importation, but are subject to seizure and forfeiture.

"Liquors properly carried as sea stores may be returned to a foreign port on the vessel's changing from the foreign to the coasting trade, or may be transferred under supervision of the customs officers from a vessel in foreign trade, delayed in port for any cause, to another vessel belonging to the same Line or owner.

"Articles 106 and 107 of the Customs Regulations of 1915 are amended accordingly.

(signed) JOUETT SHOUSE, Assistant Secretary"

Treasury Decision 38248, amended the preceding as follows:

"SEA STORES—LIQUORS.

"Opinion of the Attorney General with respect to the practice under T. D. 38218 of sealing liquors listed as sea stores on vessels while in ports of the United States. Distinction made between American and foreign vessels. T. D. 38218 amended.

"Treasury Department, January 27, 1920

"To Collectors of Customs and Others Concerned:

"Attention is invited to the appended copy of an opinion rendered the Department by the Attorney-General with respect to the practice under T. D. 38218 of sealing liquors carried as sea stores on all vessels while in the ports of the United States, as indicated by the questions submitted to him.

"Following the opinion of the Attorney-General the first paragraph of T. D. 38218 is hereby amended to read as follows:

"All liquors which are prohibited importation but which are properly listed as sea stores on American vessels arriving in ports of the United States, should be placed under seal by the Boarding Officer and kept sealed during the entire time of the vessel's stay in port, no part thereof to be removed from under seal for use by the crew at meals or for any other purposes. All such liquors on foreign vessels should be sealed on arrival of the vessel in port, and such portions thereof released from seal as may be required from time to time for use by the officers and crew.

"The other provisions of T. D. 38218 are not affected by the Attorney-General's opinion, and therefore remain without modification.

JOUETT SHOUSE,
Assistant Secretary."

The letter referred to in Treasury Decision 38248 was a letter from Mr. Palmer, then Attorney General, to the Secretary of the Treasury, dated January 23, 1920. It is as follows, 32 Opinions of Attorney-General 96:

"Department of Justice
January 23, 1920.

"Sir: I have the honor to acknowledge receipt of your letter of January 20th, enclosing a letter from the Secretary of State with a communication from the Italian Embassy regarding instructions given to collectors of customs in Treasury Decision No. 38218 of December 11, 1919, requiring that all liquors which are prohibited importation, but which are properly listed as sea stores on vessels arriving in ports of the United States, should be placed under seal by the boarding officer and kept sealed during the entire time of the vessel's stay in port, no part thereof to be removed from under seal for use by the crew at meals or for any other purpose. You ask my opinion upon the following questions:

" '1. Are the instructions mentioned and the practice of the customs officers in accordance therewith authorized under the law?

" '2. If permissible in part but not in their entirety, to what extent should they be modified to meet legal requirements and to restrain as far as possible the prevalent practice of smuggling liquor stores from vessels in ports of the United States?

" '3. Should there be any difference in practice as between American and foreign vessels in such matters?'

"With respect to American vessels it is sufficient to say that the Prohibition Law applies as well on board such vessels while in American ports as at any other point within the United States. As to such vessels I do not think the validity of

the regulation mentioned can be successfully questioned.

"The status of foreign vessels in American ports, however, is somewhat different. I think the state of international law on the subject of private vessels in foreign ports is, generally speaking, this:

" 'So far as regards acts done at sea before her arrival in port and acts done on board in port, by members of the crew to one another, and so far as regards the general regulation of the rights and duties of those belonging on board, the vessel is exempt from local jurisdiction; but, if the acts done on board affect the peace of the country in whose port she lies, or the persons or property of its subjects, to that extent that State has jurisdiction.' Moore's International Law Digest, Vol. II, page 297.

"The complaint made against the Treasury decision mentioned is that by requiring liquors properly listed as sea stores to be kept under seal during the time such vessels are in American ports it prevents the distribution to the crews of the usual amount for daily consumption, which in the case of Italian vessels it is said is required by the contracts with the crews.

"I agree entirely that excessive or surplus liquor stores are subject to seizure and forfeiture, but I am not prepared to say that the daily distribution to the crews of the usual quantity for consumption on board the ship so affects the peace of this country that American officials are authorized to interfere. Of course, the bringing of such liquors on shore, even by the members of the crew to whom they are issued, will be unlawful and subject the offender to prosecution, but so long as the liquors on board are properly listed as sea stores,

and are not excessive in quantity I do not think their daily distribution on board the ship can properly be interfered with by this Government.

"I am therefore of opinion that the regulations should be modified to the extent above indicated.

Respectfully,

A. MITCHELL PALMER,

"To the Secretary of the Treasury."

It was under the provisions of these Treasury regulations, which have been strictly followed in all respects, that the appellant kept, when within the territorial waters of the United States, as sea stores on board its vessels, liquor which it had lawfully purchased in foreign ports.

It is understood to be the uniform practice of this Court when interpreting a statute which may be ambiguous or of doubtful applicability to a situation to give great weight to the construction actually put on it by the executive department and officers actually enforcing it.

Edward's Lessee v. *Darby*, 12 Wheat 206.
U. S. v. *Gilmore*, 8 Wall. 330.
Smythe v. *Fiske*, 23 Wall. 374, 382.
U. S. v. *Moore*, 95 U. S. 760, 763.
Brown v. *U. S.*, 113 U. S. 568, 571.
U. S. v. *Philbrick*, 120 U. S. 52, 59.
U. S. v. *Hill*, 120 U. S. 169, 183.
Schell's Executors v. *Fauché*, 138 U. S. 562.
U. S. v. *Alabama &c. Ry.*, 142 U. S. 615, 621.
Taylor v. *U. S.*, 207 U. S. 120, 125.

II. *Intoxicating liquors, having the status of sea stores above described, and their situs on board a vessel*

do not come within any of the prohibitions of the Eighteenth Amendment, although kept on board a vessel of the United States within territorial waters of the United States.

The provisions of the first section of the Eighteenth Amendment are as follows:

> "Section 1. After one year from the ratification of this article the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited."

A. *Intoxicating liquors incorporated as sea stores on a vessel, are not the subject of "importation into" the United States.*

An importation involves bringing merchandise within the limits of a port of entry with the intention of unlading it there. Sea stores are, in the first place, not merchandise and, in the second place, they are not brought within a port of entry with the intention of unlading them.

The Schooner Mary, 1 Gall. 206, 16 Fed. Cas. 932 (1812).

Arnold et al. vs. *United States*, 9 Cranch. 104 (1815).

United States vs. *Lyman*, 1 Mason 482, 26 Fed. Cas. 1024 (1818).

Brown vs. *The State of Maryland*, 12 Wheat. 419 (1827).

Meredith vs. *United States*, 13 Pet. 486 (1839).
Harrison vs. *Vose*, 9 How. 372 (1850).
United States vs. *Ten thousand cigars* (1855), 2 Curt. 436, 28 Fed. Cas. 38, citing *U. S.* vs. *Vowell*, (1809) 5 Cranch. 368.
The steamer Missouri, 4 Ben. 410 (1870), affirmed 9 Blatchf. 433 (1872).
United States vs. *Eighty-five Head Cattle*, 205 Fed. 679, 681 (1913).

In fact the distinction between an importation and sea stores runs throughout our entire Customs legislation as evidenced by the Statutes and cases cited above.

In the case of *The Conqueror*, 166 U. S. 110, (1896), Mr. Justice Brown spoke as follows, at page 115:

> "Vessels certainly have not been treated as dutiable articles, but rather as the vehicles of such articles, and though foreign built and foreign owned, are never charged with duties when entering our ports, though every article upon them, that is not a part of the vessel or of its equipment or provisions, is subject to duty, unless expressly exempted by law * * *."

And further, at page 118:

> "But the decisive objection to the taxability of vessels as imports is found in the fact that, from the foundation of the Government, vessels have been treated as *sui generis*, and subject to an entirely different set of laws and regulations from those applied to imported articles. By the very first act passed by Congress in 1789, subsequent to

an act for administering oaths to its own members, a duty was laid upon 'goods, wares and merchandise' imported into the United States, in which no mention whatever is made of ships or vessels; but by the next act entitled 'An act imposing duties on tonnage' a duty was imposed 'on all ships or vessels entered in the United States' at the rate of six cents per ton upon all such as were built within the United States, and belonged to American citizens; of thirty cents per ton upon all such as should thereafter be built within the United States, belonging to subjects of foreign powers, and of fifty cents per ton upon all other ships or vessels, with a proviso that no American ship or vessel employed in the coasting trade or fisheries should pay tonnage more than once in any year. This distinction between 'goods, wares and merchandise' and 'ships or vessels', has been maintained ever since although the amount of such duties has been repeatedly and sometimes radically changed * * *."

B. *When a vessel passes out of our territorial waters sea stores are not the subject of "exportation from" the United States.*

Exportation means at least a sending out with an intention to land in a foreign country and that the goods exported should enter into the mass of things belonging to and situate in such country.

In *Swan and Finch Co.* vs. *United States*, 190 U. S. 143, the question arose as to whether lubricating oils manufactured from imported rape seed, on which duty had been paid, and other oils which were for use on board and to be consumed by the vessel was such an exportation of

the oils as to entitle the sellers to drawbacks under Sec. 22 of the Act of August 28, 1894, re-enacted as Sec. 33 of the Act of July 27, 1897.

In determining this question, which it will be observed is almost exactly the question with which we are faced in determining whether sea stores are subject to "exportation from" the United States, Mr. Justice Brewer, speaking for the Supreme Court, said at page 144:

> "* * * Whatever primary meaning may be indicated by its derivation, the word 'export' as used in the Constitution and laws of the United States, generally means the transportation of goods from this to a foreign country. 'As the legal notion of emigrating is a going abroad with an intention of not returning, so that of exportation is a severance of goods from the mass of things belonging to this country with an intention of uniting them to the mass of things belonging to some foreign country or other'. 17 Op. Attorneys General 583.
>
> "True, the context may sometimes give to the word a narrower meaning, and in the execution of the administrative affairs of government it may have been applied to cases in which there was not in the full sense of the term an exportation, yet these are exceptions and do not destroy its general signification. It cannot mean simply a carrying out of the country, for no one would speak of goods shipped by water from San Francisco to San Diego as 'exported' although in the voyage they are carried out of the country. Nor would the mere fact that there was no purpose of return justify the use of the word 'export'. Coal, placed on a steamer in San Francisco to be consumed in propelling that

> steamer to San Diego would never be so designated. Another country or state as the intended destination of the goods is essential to the idea of exportation."

The same principle was laid down by the Honorable Charles J. Bonaparte in an opinion rendered to the Secretary of the Treasury on December 4, 1908, on the question of the withdrawal of whiskey from bond for transportation to foreign ports and re-importation. *27 Opinions of the Attorney General*, 113.

Furthermore, to constitute "exportation" the goods must originate in the country from which they are claimed to be exported. Sea stores of liquor can not under the law originate here.

At the argument in the Court below the Government admitted that there was not any question of "importation" or "exportation" of these sea stores, and it is assumed that there will not be any claim to the contrary in this Court.

C. *Intoxicating liquors incorporated into sea stores whilst kept on board a vessel of the United States, moving in territorial waters, are not the subject of "transportation within" the United States.*

The situation of sea stores kept on board a vessel while moving within the territorial waters of the United States is not in any way whatsoever affected by the decision of this Court rendered May 15, 1922, in the cases

of *Grogan* vs. *Walker & Sons*, and the *Anchor Line* vs. *Aldridge*.

In both those cases there was a carriage of merchandise consigned by a shipper to a consignee and one part of the transportation between the shipper and the consignee was within the United States. Freight was paid for this transportation. Even if the geographical distance of such transportation was very small, still there was no escape from the conclusion of this Court, that the case involved the question of liquor as merchandise on its way from a shipper to a consignee and during that transit passing within the jurisdiction of the United States.

We contend that these cases do not touch the situation presented in the present case.

The present case comes precisely within the decision of the United States Supreme Court in *Street* vs. *Lincoln Safe Deposit Co. et al.*, 254 U. S. 88, which, as we read the case, was decided on the ground that the liquor had been lawfully acquired and was lawfully in possession of the plaintiff, and was to be lawfully used.

It was not in transit from a shipper to a consignee but it was in a lawful situs in the ownership and possession of a man who had lawfully acquired it. That is exactly the condition here.

As was said in the case of *Gloucester Ferry Co.* vs. *Pennsylvania*, 114 U. S. 196 (1884), by Mr. Justice Field, at page 203:

> "* * * Transportation implies the taking up of persons or property at some point and putting them down at another. * * *."

Therefore, transportation necessarily involves a separation of the vehicle from the thing carried at the end of the voyage or journey.

In his opinion in the District Court, Judge Hand attempted to square his decision with the requirements laid down for transportation in the *Gloucester Ferry Company* case by saying that the sale of sea stores of liquor on the high seas to a passenger was a consummation of a transportation because the title to the liquor and the possession thereof was passed to the passenger as its ultimate destination when he drank it on board the vessel.

He compares the situation to that of a collier which might clear from our ports to coal friendly cruisers at sea as happened during the early part of the European war.

Judge Hand is wrong in his decision and his simile is not apt.

In the case of the collier clearing to coal friendly cruisers, the intention would have been to deliver the coal to the friendly cruiser and thus to separate the coal from the collier. That would be a situation which would fall within the definition of transportation contained in the *Gloucester Ferry Company* case.

But, in the present case, there is not any segregation of the sea stores from the vessel when they are bought and used by a passenger on board the vessel.

Taking merchandise on board a vessel at one place and carrying it to another place and there putting it off the vessel is of the essence of transportation in the ordinary use of the word

In the present case there is not any separation of the sea stores from the ship. They are not set down at any point. They are acquired and taken on board for

the purpose of consumption on board. They are *incorporated, as it were, into the body of the ship as a part of her equipment to perform the business of a passenger carrier. Sea stores are really aids to transportation. They are not subjects of transportation as ordinary goods in commerce are.*

Whilst, of course, all parts of the vessel, including her masts, spars, tackle and apparel, as well as her sea stores, necessarily move with her when she moves, they are not being transported in the sense of that word as understood by our statutes or case law.

They are not "merchandise" because sea stores are not intended to be introduced into the body of commodities of this or any other country. They are part of the ship and a necessary part.

It has been settled by the decision of this Court in the case of *The Conqueror*, 166 U. S. 110, that a ship or vessel is not "articles", "goods, wares or merchandise" and that when coming into our ports she is not subject to Customs laws as such.

The greater must include the less.

III. *The possession of intoxicating liquors lawfully acquired and kept sealed as sea stores is legal within the territorial waters of the United States.*

It is to be observed that the Eighteenth Amendment does not make either the purchase or the possession of intoxicating liquors for beverage purposes illegal. Consequently, if the National Prohibition Act should seek to

make possession a crime and unlawful, it would be obviously unconstitutional.

In view of the fact that the Amendment does not prohibit possession, it is not within the right of Congress to say a possession under the Amendment shall be unlawful.

Possession *per se* is not unlawful. The most that can be claimed from the fact of possession is that, under the circumstances of a particular case, possession may indicate that some prohibition of the Amendment may have been violated.

That is all that the National Prohibition Act does or could do.

Section 25 of the National Prohibition Act provides (Italics ours)—

> "It shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor *intended for use in violating this title* * * *."

Section 33 provides—

> "After February 1, 1920, the possession of liquors by any person not legally permitted under this title to possess liquor shall be prima facie evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished or otherwise disposed of in violation of the provisions of this title. Every person legally permitted under this title to have liquor shall report to the commissioner within ten days after the date when the eighteenth amendment of the Constitution of the United States goes into effect,

> the kind and amount of intoxicating liquors in his possession. But it shall not be unlawful to possess liquors in one's private dwelling while the same is occupied and used by him as his dwelling only and such liquor need not be reported, provided such liquors are for use only for the personal consumption of the owner thereof and his family residing in such dwelling and of his bona fide guests when entertained by him therein; and the burden of proof shall be upon the possessor in any action concerning the same to prove that such liquor was lawfully acquired, possessed and used."

Inasmuch as the Amendment does not prohibit possession of intoxicating liquors, it is submitted that the statute passed for the enforcement of the Amendment cannot make it illegal to possess liquors lawfully acquired and intended for lawful use.

In other words, an assistant statute passed for the enforcement of the Amendment cannot be broader than the Amendment, and cannot make crimes of acts not prohibited by the Amendment.

This is conclusively shown by the Supreme Court decision in *Street* v. *Lincoln Safe Deposit Company*, 254 U. S. 88 (1920), where Mr. Justice Clarke says, at pages 93-94, in dealing with Sections of the National Prohibition Act above quoted:

> "Thus it is plain that in the sections of the act relied upon there is no specific prohibition against the storage of liquors under the circumstances admitted to exist in this case, and we find no other provisions by which such a custody is rendered unlawful."

And so in this case there is no provision against a vessel of the United States having lawfully acquired liquors among her sea stores whilst she is in the territorial waters of the United States.

The *Street* case shows conclusively that there can be a legal possession of liquors other than a possession specifically made legal under the Act.

In the *Street* case there was no express warrant in the Act for possessing the liquors while moving them through the streets of New York.

The *Street* case further shows that the possession or unexplained presence of intoxicating liquors merely gives rise to a presumption of illegality, which presumption can be rebutted by showing that the liquor was lawfully acquired and intended for lawful use.

When it is shown, as in this case, that the liquor was lawfully acquired and that there is no intention to violate the provisions of the Act, any possible presumption of illegality in the possession is met and defeated.

On this point, Mr. Justice Clarke said in the *Street* case, 254 U. S. 88, at page 94:

> "Assuming that the unexplained presence of the liquors in the Company's warehouse would give rise to the prescribed presumption, yet, if that presumption should be rebutted by appropriate testimony (as it is in this case by admissions) that the liquor to which it is applied is not being kept for the purpose of sale, barter, exchange, furnishing or otherwise disposing of it in violation of the provisions of the title, the implication is plain that the possession should be con-

> sidered not unlawful, even, though it be by a person 'not legally permitted,'—that is by a person not holding a technical permit to possess it, such as is provided for in the Act."

Any other holding would be to attribute to Congress an intention to confiscate private property lawfully acquired and intended for lawful uses.

This was pointed out by Mr. Justice Clarke in the *Street* case, at page 95:

> "An intention to confiscate private property, even in intoxicating liquors, will not be raised by inference and construction from provisions of law which have ample field for other operation in effecting a purpose clearly indicated and declared."

There remains to be considered the question of the applicability of the Eighteenth Amedment and the National Prohibition Act to vessels of the United States outside the territorial waters of the United States.

If, as we contend, the Eighteenth Amendment and the National Prohibition Act do not apply to vessels of the United States in such situations, then possession with intention to sell outside the territorial waters of the United States is not a possession of liquor "*intended for use in violating*" the provisions of the National Prohibition Act.

SECOND POINT.

THE DISTRICT JUDGE ERRED IN HOLDING THAT VESSELS OF THE UNITED STATES ON THE HIGH SEAS AND IN FOREIGN PORTS ARE TERRITORY SUBJECT TO THE JURISDICTION OF THE UNITED STATES WITHIN THE MEANING OF THE EIGHTEENTH AMENDMENT AND SUBJECT TO THE PENALTIES OF THE NATIONAL PROHIBITION ACT, AND HENCE WERE NOT FREE TO SELL INTOXICATING LIQUORS ON THE HIGH SEAS AND IN FOREIGN PORTS.

1. *The Text of the Eighteenth Amendment.*

The text of the Eighteenth Amendment, which the National Prohibition Act was passed to enforce, is as follows:

> "Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.
>
> "Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation."

2. *The Eighteenth Amendment was not necessary to give Congress power to legislate*

a. For lands subject to the jurisdiction of the United States and not included among the several States, or

b. For vessels of the United States engaged in foreign or coastwise commerce.

Before the Eighteenth Amendment was passed, Congress had power to legislate regarding liquor traffic in the exercise of police power within the territories over which it held legislative powers, such as the District of Columbia, the Indian Reservations, the Territories, Alaska, the Panama Canal Zone and our overseas possessions.

It also had power to legislate and did pass much legislation in connection with liquor traffic in interstate commerce.

In the Wilson Act of August 8, 1890, 26 Stat. 313, known as the Original Package Act, there was a provision allowing States bordering on the Mississippi River, in the exercise of their police powers, to exact a license fee as a condition of the right to sell intoxicating liquors over the bar on board steamboats navigating the Mississippi whilst within the boundaries of such State. Such license fees were approved. *Foppiano* v. *Speed*, 199 U. S. 501, 520.

There was also a provision in the Wilson Act to the effect that if liquors were delivered in a State in the original packages, they were not thereby exempted from the operation and effect of the laws passed by the State of destination in the exercise of its police powers.

Later, in the so-called Webb-Kenyon Act, enacted by Congress on March 1, 1913, 37 Stat. 699, the shipment in interstate commerce of intoxicating liquors whether in

the original package or otherwise, in violation of the law of the State of destination was prohibited.

Adams Express Company v. *Kentucky*, 238 U. S. 190 (1915).

The object of this law was to keep interstate commerce from being used to further unlawful purposes by shipment of goods into prohibition States or areas.

On March 3, 1917, Congress passed the Act to prevent the manufacture and sale of intoxicating liquors in the District of Columbia. 39 Stat. 1123.

In the same year Congress passed the Alaska Prohibition Act of February 14, 1917.

It was, therefore, obviously not necessary to have any prohibition amendment to enable Congress to exercise such police powers as might seem to it fit

(a) over territory in respect of which it had legislative powers or

(b) in regard to matters, such as interstate and foreign commerce, over which it was given legislative powers by the Constitution.

The Eighteenth Amendment, so far as the vesting of power in Congress was concerned, therefore, did not add anything to the powers Congress already possessed in a large field of legislation.

One principal effect of the amendment was, however, to break down State lines and give Congress the power to legislate in respect of matters involving liquor, which had never crossed a State boundary, in a way which would not have been possible in the absence of the amendment.

This aspect of the situation has been emphasized in the case of *United States* v. *Lanza*, decided December 11, 1922, and not yet reported, in which it was held that a prosecution under the National Prohibition Act was not barred by a conviction under a State Act.

Mr. Chief Justice Taft, speaking for this Court, said of the Amendment, at page 3 of the printed advance sheet of the opinion, (Italics ours):

> "The Amendment was adopted for the purpose of establishing prohibition as a national policy reaching every part of the United States and affecting transactions which are essentially local or intrastate, as well as those pertaining to interstate or foreign commerce. The second section means that power to take legislative measures to make the policy effective shall exist in Congress in respect of the territorial limits of the United States and at the same time the like power of the several States within their territorial limits shall not cease to exist."

The Eighteenth Amendment was the direct exercise of the police power in respect of liquor by the people of the United States in their Sovereign capacity. It incorporated in the basic law of the land full prohibition against intoxicating liquor for beverage purposes.

Before the amendment both Congress and the States in the absence of provisions in their own constitutions might have changed their policy with regard to liquor traffic, but since the amendment any legislation except to enforce the amendment is unconstitutional.

The amendment was in fact a mutual surrender of the exclusive legislative rights of Congress and of the States regarding questions involving prohibition.

This effect is, perhaps, best described by Mr. Chief Justice Taft in *United States* v. *Lanza*, at page 3 of the printed advance sheet:

> "To regard the Amendment as the source of the power of the States to adopt and enforce prohibition measures is to take a partial and erroneous view of the matter. Save for some restrictions arising out of the Federal Constitution, chiefly the commerce clause, each State possessed that power in full measure prior to the Amendment, and the probable purpose of declaring a concurrent power to be in the States was to negative any possible inference that in vesting the National Government with the power of country-wide prohibition, state power would be excluded. In effect the second section of the Eighteenth Amendment put an end to restrictions upon the State's power arising out of the Federal Constitution and left her free to enact prohibition laws applying to all transactions within her limits."

But, however much we may search the Amendment and the National Prohibition Act, the arguments and the reports in Congress which led up to their adoption, we cannot find any sign of an intention to cover vessels of the United States or other objects outside the *territorial* limits of the United States.

Vessels of the United States are not literally within the Amendment.

It should be remembered also that the Eighteenth Amendment has to be read as any other amendment of the Constitution is read. It is only by and in the National Prohibition Act that broad construction is required.

In the Constitution more, perhaps, than elsewhere words must be assumed to have the meaning they have in common use at the time when the Constitution or an amendment to it is adopted. *Tennessee* v. *Whitworth*, 117 U. S. 139.

There was not any power expressly vested in Congress by the Prohibition Amendment to legislate for vessels of the United States.

Congress already had the power to legislate prohibition for vessels of the United States under the Commerce Clause.

The fact that Congress already had under the Commerce Clause this power which had not been exercised indicates clearly that the Eighteenth Amendment should not be used as a basis for contending that Congress legislated in the Enforcements acts for prohibition on vessels of the United States.

The reason that Congress has not exercised its power to legislate as to prohibition under the Commerce Clause for vessels of the United States is probably because it has realized that vessels of the United States could not compete in international trade with other vessels if prohibition should be enforced on board our vessels.

As the only claim of the Government that vessels of the United States are prohibited from selling liquor on the high seas and in foreign ports is based on the Eighteenth Amendment and the National Prohibition Act it is necessary to consider the Amendment and the Act in detail in order to point out the fallacy of the Government's contention for reasons additional to those just given.

3. *Vessels of the United States are not "territory subject to the jurisdiction of the United States" within the meaning of the Eighteenth Amendment, nor are they subject to the National Prohibition Act.*

The fact that Congress, when it passed so comprehensive and sweeping an act as is authorized by the second section of the amendment to enforce the provisions of the first section, made absolutely no reference to violations of the amendment, or the act, on vessels of the United States upon the high seas or in foreign ports, goes far to support the construction that the amendment does not apply to such vessels in such places.

If it had been contemplated by Congress that the amendment and the enforcement acts were to apply to vessels of the United States upon the high seas or in foreign ports, is it not reasonable to assume that Congress would have said so?

The National Prohibition Act was not an act passed by the Government to defend itself against fraud wherever perpetrated as was the case in *United States* vs. *Bowman,* United States Supreme Court, November 13, 1922, not yet reported. It was a statute passed to punish acts which had hitherto been lawful and which became unlawful only when performed within those territories to which the Constitution extends. The Constitution does not follow a vessel of the United States to sea. *In re Ross,* 140 U. S. 453.

The National Prohibition Act and the Supplemental Act of November 23, 1921, are the strictest kind of territorial legislation and are logically dependent on locality

for the Government's jurisdiction. Such laws have never been held to have any force without the strict territorial limits of the United States or its organized territories even though they embody as this law does a national policy. *American Banana Company* vs. *United Fruit Company*, 213 U. S. 347.

The limitation of the National Prohibition Act to the territorial limits of the United States has already been recognized in the *National Prohibition Cases, supra*, wherein Mr. Justice Vandevanter said, p. 386 (Italics ours):

> "The first section of the Amendment—the one embodying the prohibition—*is operative throughout the entire territorial limits of the United States, binds all legislative bodies, courts, public officers and individuals within those limits,* * * *"

The statute is territorial legislation and the acts prohibited are unlawful only when performed within the territorial jurisdiction of the United States. The Statute is logically dependent on the locality of the acts for the Government's jurisdiction.

It is natural, therefore, to suppose that if Congress had intended to punish as crimes any acts committed outside of the strict territorial jurisdiction of the United States, it would have said so, and that the failure to say so negatives the purpose of Congress in that regard. *United States* vs. *Bowman, supra.*

Furthermore, the statutes of Congress have never been held to apply to the internal affairs of vessels. *Brown* vs. *Duchesne*, 19 How. 183; *Taylor* vs. *U. S.*, 207 U. S. 120; *Scharrenberg* vs. *Dollar Steamship Co.*, 245 U. S. 122; *United States* vs. *Inness*, 218 Fed. 705.

Even in the case of the Seamen's Act of 1915, which embodied a national policy, and which, by Section 11, prohibited, in the most general terms, advance payments of wages to seamen, it was held that the Statute did not prohibit advance payments of wages by an American vessel in a foreign port. *Neilson* vs. *Rhine Shipping Company,* 248 U. S. 205.

The language employed in the Eighteenth Amendment is inappropriate to a prohibition of the forbidden acts upon the high seas.

The significant words are "manufacture, sale, or transportation of intoxicating liquor within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof." These are all phrases appropriate to land.

If it had been intended to prohibit the manufacture and sale on board of, or the transportation by, a vessel of the United States upon the high seas or in foreign ports, of intoxicating liquors, one would never have spoken of prohibiting the "*manufacture or sale within*" a vessel, and certainly not the "*transportation within*" a vessel; and more manifest still, one would never speak of "*importing into*" or "*exporting from*" a vessel. The phrases would have been transportation, or importation, or exportation *by* a vessel, and manufacture or sale *on board* a vessel.

The fact is that the Amendment does not purport to prescribe prohibition with reference to places such as buildings or vehicles, but to geographical limits within which no manufacturing, selling, transporting, importing or exporting shall be carried on.

In that sense the words employed are most accurate and appropriate, but they are entirely out of accord with any use that would refer to the prohibited acts on board ships upon the high seas or in foreign ports.

This construction finds support in the phraseology of the Thirteenth or Slavery Amendment. It was said in regard to the Thirteenth Amendment by Mr. Justice Brewer in *Clyatt* v. *United States*, 197 U. S. 207, "This amendment denounces a status or condition." It is very evident that the intent was to make it operative wherever an amendment to the Constitution could reach, and so the words "within the United States *or any place* subject to their jurisdiction," not any *territory* subject to their jurisdiction, were used.

But the Eighteenth Amendment does not create a status; it prohibits certain acts. And the natural limits of a prohibition are certainly geographical unless it is made clearly evident by appropriate language that the prohibition is to operate with respect to things, such as ships upon the high seas and in foreign ports, as well as to operate within territorial limits.

The construction which we contend should be placed upon the words "territory subject to the jurisdiction thereof" is in accord with the prior use of the word "territory" in the Constitution. It appears in Article 4, Section 3, which provides:

> "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

This provision has received as careful and extended consideration by the Supreme Court as any provision of the Constitution. Particularly did its meaning become of the greatest importance following the acquisition of Porto Rico and the Philippine Islands by the Treaty of Peace with Spain at the conclusion of the Spanish-American War.

An examination of the decisions of the Supreme Court in the *Insular Cases* (*De Lima* v. *Bidwell*, 182 U. S. 1; *Dooley* v. *United States*, 182 U. S. 222; *Downes* v. *Bidwell*, 182 U. S. 244; *Dorr* v. *United States*, 195 U. S. 138) shows beyond controversy that the word "territory" as there used in the Constitution referred to the lands acquired by the United States by purchase, acquisition, cession or voluntary association as in the case of Hawaii.

This accords with the earlier construction expressed in the opinion of Mr. Justice Thompson in the case of *United States* v. *Gratiot*, 14 Peters 526, wherein he defined the word "territory" as follows:

> "And the constitution of the United States (article four, section three) provides, 'That Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.' The term territory, as here used, is merely descriptive of one kind of property, and is equivalent to the word lands. And Congress has the same power over it as over any other property belonging to the United States, and this power is vested in Congress without limitation, and has been considered the foundation upon which the territorial governments rest."

Given its broadest meaning, the word "territory" as used in the Eighteenth Amendment cannot, under any accepted authority, be accorded a meaning which extends the prohibition embodied in the amendment to anything else than lands under the jurisdiction of the United States.

The rule of construction was succinctly stated by Mr. Chief Justice Waite in *Tennessee* v. *Whitworth*, 117 U. S. 139:

> "Words in a Constitution as well as words in a statute, are always to be given the meaning they have in common use, unless there are very strong reasons to the contrary."

The Eighteenth Amendment is an amendment to the Constitution, and we submit, only reaches those territories to which the Constitution has been applied.

It is claimed by those who seek a contrary construction, that the reason why the amendment should be held to apply to ships is because the Constitution follows the flag. This, of course, is not a correct statement of law. If any constitutional principle has become established, it is that the Constitution does not follow the flag. On the contrary, while the American flag flies over all territories and places subject to the jurisdiction of the United States, the Constitution only applies to those territories and places to which it has been extended by express act of Congress.

This principle was stated by Mr. Justice Brown in delivering the opinion in *Downes* v. *Bidwell*, 182 U. S 244, p. 278, in the following words (Italics ours):

> "Indeed, the practical interpretation put by Congress upon the Constitution has been long continued and uniform to the effect that *the Constitution is applicable to territories* acquired by purchase or conquest *only when and so far as Congress shall so direct.*"

And in *Dorr* v. *United States*, 195 U. S. 138, Mr. Justice Day, delivering the opinion of the court enunciated the same principle:

> "We conclude that the power to govern territory, implied in the right to acquire it, and given to Congress in the Constitution in Article IV, Sec. 3, to whatever other limitations it may be subject, the extent of which must be decided as questions arise, does not require that body to enact for ceded terrritory, not made a part of the United States by Congressional action, a system of laws which shall include the right of trial by jury, and that *the Constitution does not, without legislation and of its own force, carry such right to territory so situated.*"

In other words, except as expressly extended by Congressional action, the guarantees of the Constitution do not extend beyond the territorial limits of the United States, except when and so far as express provision therefor is made.

This was the principle underlying the decision of the Supreme Court in *In re Ross*, 140 U. S. 453, wherein the Court held that an American citizen, who committed a murder on an American vessel in the harbor of Yokohama, Japan, and who was tried before the United States

Consular General Court in Japan, under and by virtue of the Treaty of June 17, 1857, which conceded to American Consuls in Japan authority to try Americans committing offenses in that country, could not invoke the provisions of the Constitution which guaranteed the right of trial by jury. Mr. Justice Field, delivering the opinion, said at page 464 (Italics ours):

> "By the Constitution a government is ordained and established 'for the United States of America', and not for countries outside of their limits. The guarantees it affords against accusation of capital or infamous crimes, except by indictment or presentment by a grand jury, and for an impartial trial by a jury when thus accused, apply only to citizens and others within the United States, or who are brought there for trial for alleged offences committed elsewhere, and not to residents or temporary sojourners abroad. *Cook* v. *United States*, 138 U. S. 157, 181. The Constitution can have no operation in another country. When, therefore, the representatives or officers of our government are permitted to exercise authority of any kind in another country, it must be on such conditions as the two countries may agree, the laws of neither one being obligatory upon the other. The deck of a private American vessel, it is true, is considered for many purposes constructively as territory of the United States, *yet persons on board of such vessels*, whether officers, sailors, or passengers, *cannot invoke the protection of the provisions referred to until brought within the actual territorial boundaries of the United States.*"

Until Congress expressly extends the privileges of the Constitution to the vessels of the United States it is submitted that it would be improper to extend its punitive provisions by inference to such vessels.

Congress has not extended the Constitution to the Philippine Islands, Hawaii or Porto Rico, except in a limited way, for the acts of Congress creating organized governments in those territories are grounded upon the principle which we have just discussed.

It is open to question whether the Eighteenth Amendment applies to all territories outside of the United States proper which may be subject to the jurisdiction of the United States. That it does not do so to its full extent seems necessarily to follow from the very legislation by which the Eighteenth Amendment is to be enforced.

Certainly, it cannot be denied that the Panama Canal Zone has an organized government. But Congress, after expressly enacting that

> "It shall be unlawful to import or introduce into the Canal Zone, or to manufacture, sell, give away, dispose of, transport, or have in one's possession or under one's control within the Canal Zone, any alcoholic, fermented, brewed, distilled, vinous, malt, or spirituous liquors, except for sacramental, scientific, pharmaceutical, industrial, or medicinal purposes, under regulations to be made by the President, and any such liquors within the Canal Zone in violation hereof shall be forfeited to the United States and seized,"

appended this qualification:

> *"Provided, That this section shall not apply to liquor in transit through the Panama Canal or on the Panama Railroad."*

If the Constitution, and the Eighteenth Amendment as an amendment thereof, were applicable to territories subject to the jurisdiction of the United States having organized governments, without an express extension thereof by an act of Congress, then Congress did not have the authority to enact that statute, because it embodies a limitation upon the operation of the Amendment.

The first section of the Amendment prohibits the

> "manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof."

The second section of the Amendment expressly confers upon Congress and the several States concurrent power to enforce the first section by appropriate legislation. This constitutes not only a grant of power, but a limitation upon the power of Congress, for the only legislation which Congress can pass where the Constitution applies is legislation to enforce the first section of the Amendment. It cannot enact legislation which will lessen or detract from the operation of prohibition over those territories to which the Constitution applies. This was clearly stated by Mr. Justice Van Devanter as the seventh conclusion of the Supreme Court in the *National Prohibition Cases, supra,* wherein he said (Italics ours):

> "The *second section* of the Amendment—the one declaring 'The Congress and the several States shall have concurrent power *to enforce* this article by appropriate legislation'—*does not enable Congress* or the several States *to defeat or thwart* the prohibtion, *but only to enforce it* by appropriate means."

If, therefore, the Constitution, and the Eighteenth Amendment, as an amendment thereof, applied to the Canal Zone without the aid of Congressional legislation making it expressly so applicable, then Congress could not have defeated or thwarted the amendment, even in part, by providing that the transportation of liquor through the Canal Zone or on the Panama Railroad should be permitted.

Certainly the broad right to transport liquor through the Canal or on the Railroad, without requiring the presence of the factor which lead the Supreme Court to hold in *Street* v. *Lincoln Safe Deposit Co.*, 254 U. S. 88, that the movement of liquor was not a transportation within the meaning of the Amendment, would, if acted upon, constitute such a transportation as would be in violation of the Amendment, if by its terms it was applicable to the Canal Zone.

The exception of the Canal and the Railroad from the complete operation of the Enforcement Act thus constitutes the strongest possible proof that when Congress used the word "territory" in the Eighteenth Amendment it referred only to the organized territories of the United States, to which, by the act of Congress under the established principles of constitutional law, the

Constitution and Amendment had been extended. Otherwise a partial application of the Enforcement Act to the Canal and the Railroad could not have been made.

This practical construction which Congress has placed upon the Amendment is the best evidence of its intended scope. It shows that it has no application *ex proprio vigore* even to organized territories not incorporated in the United States.

Furthermore, if the amendment and the National Prohibition Act of their own force applied to the Panama Canal Zone, why did Congress think it necessary to pass section 20 expressly extending prohibition to the Canal? That Congress did not think that the Amendment and the National Prohibition Act of their own force applied to the Canal Zone, is shown by the exception made in section 20 with respect to liquor in transit through the Canal or on the railroad. The exception read:

> "Provided *this section* shall not apply to liquor in transit through the Panama Canal or on the Panama Railroad."

Exempting liquor in transit through the Canal from the prohibition of section 20, left the situation with respect to such liquor as it would have been if section 20 had not been part of the Act so that if the Amendment and the National Prohibition Act applied of their own force, transportation of liquor through the Canal or on the railroad would be prohibited. Obviously, however, Congress intended to permit the carriage of liquor in transit through the Canal or on the railroad so that it must have been in the mind of Congress that the Amendment and the National Prohibition Act did not extend of its own

force to the Canal Zone but required the special provisions of section 20 to make the Amendment and the Act applicable thereto.

The action of Congress with respect to section 20 clearly indicates therefore that Congress did not consider that the Amendment and the National Prohibition Act had any force outside the strict territorial limits of the United States and that it was proper for them therefore to make merely a partial extension of the Amendment to the Canal Zone.

The oceans and the Canal connecting them are admittedly the great highways of commerce, and it was in the exercise of a wise judgment that the Congress made only a limited application of the Eighteenth Amendment to the Canal Zone, and thus permitted the free passage of international trade.

Surely the limited application of the Enforcement Act to the Canal Zone, however, was not for the purpose of permitting the vessels of other nations only to transport liquors freely through the Canal to the prejudice of American commerce and at the same time of denying a like privilege to the ships of the nation which constructed the Canal! Yet such will be the result if a construction should now be placed on the word "territory" by which it should be held to include vessels of the United States upon the high seas.

If the Amendment should be so interpreted, notwithstanding that the Supreme Court has said, in *In re Ross, supra,* that the Constitution does not apply to ships without the territorial boundaries of the United States, and in

the *Insular Cases, supra*, that the Constitution does not apply to the organized territories except when and so far as Congress shall direct, then the Amendment would be completely at variance with the construction which Congress has necessarily placed upon it by the exception of the Canal and Railroad from its operation.

The action of Congress in expressly authorizing ships regardless of nationality to carry liquor in transit through the Panama Canal, is the strongest possible argument that Congress did not regard vessels of the United States as "territory" as contended by the Government. If Congress had regarded American ships as "territory," it would not have permitted them to carry liquor through the Panama Canal. Certainly vessels of the United States cannot be "territory" while on the high seas and not "territory" while going through the Panama Canal.

We have the direct authority of this Court against such an interpretation of the words "territory subject to the jurisdiction of the United States" in *Scharrenberg* v. *Dollar Steamship Co.*, 245 U. S. 122.

Scharrenberg v. *Dollar Steamship Co.*, 245 U. S. 122, was a case involving an alleged violation of certain provisions of the Contract Labor Act, and it was held that a vessel of the United States was not "territory subject to the jurisdiction of the United States." In that case the steamship company employed as a seaman in Shanghai, a Chinaman who was transported to the port of San Francisco, where he was transferred to and shipped on the American steamer Mackinaw. The contract provided

that he should work in an American ship while in American ports and on the voyage back to Shanghai, with the privilege of transfer to any other British or foreign ship. The claim was that the seaman was a laborer, and had been brought into the United States within the meaning of the prohibition in the statute.

Section 2 (of the Act of February 20, 1907, c. 1134 as amended, Act of March 26, 1910, c. 128, sec. 1) provided that the following classes of aliens should be excluded from admission to the United States, among others:

> "persons hereinafter called contract laborers who have been induced or solicited to migrate to this country by offers or promises of employment, or in consequence of agreements * * * to perform labor in this country * * *."

Section 4 made it a misdemeanor to assist contract laborers into the United States, and Section 5 imposed a heavy penalty upon any persons, partnership or corporation violating Section 4 by knowingly assisting, encouraging or soliciting the importation of any contract laborer into the United States.

Section 33 of the Act provided, however, that for the purposes of the act (Italics ours):

"*The term 'United States', as used in the Title, as well as in the various sections of this Act, shall be construed to mean the United States and any waters, territory, or other place subject to the jurisdiction thereof, except the Isthmian Canal Zone.*"

It was argued, in support of the Government claim, that the steamer *Mackinaw* was part of the territory of the United States, and that, therefore, contracting to bring the Chinaman to San Francisco and there to employ him upon the vessel, was knowingly to assist and encourage the migration of an alien contract laborer into the United States, for the purpose of having him perform labor therein, in violation of the fourth and fifth sections of the Act.

In denying the soundness of the contention, the Supreme Court was required to pass upon the meaning of the words "United States and any territory subject to the jurisdiction thereof", for the reason that such was the statutory definition accorded to the words "United States". These are the identical words used in the Eighteenth Amendment. Mr. Justice Clarke, in delivering the opinion of the court, said:

> "Equally unallowable is the contention that a ship of American registry engaged in foreign commerce is a part of the territory of the United States in such a sense that men employed on it can be said to be laboring 'in the United States' or 'performing labor in this country'. It is, of course, true that for the purposes of jurisdiction a ship, even on the high seas, is often said to be a part of the territory of the nation whose flag it flies. But in the physical sense *this expression is obviously figurative* (International Law Digest, Moore, Vol. 1, Sec. 174), and to expand the doctrine to the extent of treating seamen employed on such a ship as working in the country of its registry is quite impossible. Thus the seamen employed on the 'Mackinaw' were not within either the spirit or

> the letter of the law on which the petitioner bases his action and in any point of view his contention is fanciful and unsound and must be denied."

The presence of the words "in this country" in the statute, in conjunction with the definition of the words "United States" statutorily expanded to include "territory subject to the jurisdiction thereof", not only supports the conclusions of the court, but of themselves the words clearly indicate that the Congress was using the word "territory" with reference to land within the boundaries of the United States.

Thus this decision is a direct interpretation by the Supreme Court of the identical words used in the Eighteenth Amendment, and it sustains a construction which attributes to those words a meaning that "territory" does not include vessels of the United States upon the high seas.

See also *U. S.* vs. *Hughes,* 70 Fed. 972, D. C. E. D. South Carolina (1895).

As against this contention the Government urges that the word "territory" as used in the Amendment should not be accorded its physical and constitutional meaning, but that it is used, as said by Mr. Justice Clarke in *Scharrenberg* v. *Dollar Steamship Co.,* in its figurative sense, and that in such sense it includes vessels of the United States upon the high seas and in foreign ports.

On the contrary the fundamental canon of interpretation which should be applied to it, is the one so well stated by Mr. Justice Waite in *Tennessee* v. *Whitworth,*

117 U. S. 139: "Words in a constitution as well as words in a statute are always to be given the meaning which they have in common use, unless there are very strong reasons to the contrary."

Or, as is said in *Story on Constitution*, Sec. 401:

> "Where the words are plain and clear, and the sense distinct and perfect arising on them, there is generally no necessity to have recourse to other means of interpretation."

And in the foot note:

> "In such cases the words are to be taken in the sense they naturally bear on their face."

The construction which we ask is that which has already been placed upon it by this Court in *National Prohibition Cases, supra*, wherein Mr. Justice Van Devanter said at page 386 (Italics ours):

> "6. The first section of the Amendment—the one embodying the prohibition—*is operative throughout the entire territorial limits of the United States*, binds all legislative bodies, courts, public officers and individuals within those limits, and of its own force invalidates every legislative act—whether by Congress, by a state legislature, or by a territorial assembly—which authorizes or sanctions what the section prohibits."

And as stated by Mr. Chief Justice White in his concurring opinion at page 391 (Italics ours):

> "In other words, dealing with the new prohibition created by the Constitution, *operating throughout the length and breadth of the United*

> *States,* without reference to state lines or the distinctions between state and federal power, and contemplating the exercise by Congress of the duty cast upon it to make the prohibition efficacious, it was sought by the second section to unite national and state administrative agencies in giving effect to the Amendment and the legislation of Congress enacted to make it completely operative."

Finally, as if to make it plain beyond controversy that the amendment was dealing with territorial limits in a legal sense, the Congress, in proposing the amendment, avoided the use of the broader language which has been embodied in the Thirteenth Amendment prohibiting slavery "within the United States *or any place* subject to their jurisdiction," and used the words "*territory* subject to the jurisdiction of the United States."

It had previously been decided that there were "places" even on land that were subject to the jurisdiction of the United States which were not "territory." *In re Lane*, 135 U. S. 1, 43; *Ex parte Morgan*, 20 Fed. 298, approved in *Kopel* v. *Bingham*, 211 U. S. 468.

It is unnecessary, however, to stress this point, since the Supreme Court, in the *National Prohibition Cases*, above referred to, has decided that prohibition "is operative throughout the *entire territorial limits* of the United States." The words "territorial limits" are words of limitation; they indicate boundaries within which the prohibition lies. "Territorial limits" plainly mean the limits of land. "Territorial limits" do not include the high seas or foreign ports.

A ship on the high seas or in foreign ports, even though subject to the jurisdiction of the United States

for certain purposes, cannot be said by any stretch of language to be within the "territorial limits" of the United States.

4. *The passage of the "National Prohibition Act" and the decisions thereon.*

The act entitled "National Prohibition Act", passed October 28, 1919, having been put into effect under regulations issued by the Treasury Department, certain test cases involving the act and the scope of the amendment itself came before this Court in March, 1920, and were decided on June 7, 1920.

In *The National Prohibition Cases,* 253 U. S. 350, it was stated by Mr. Justice Van Devanter as a conclusion of this Court, that:

> "The first section of the amendment—the one embodying the prohibition—is operative throughout the entire territorial limits of the United States, binds all legislative bodies, courts, public officers and individuals within those limits, and of its own force invalidates every legislative act—whether by Congress, by state legislature, or by a territorial assembly—which authorizes or sanctions what the section forbids" (p. 386).

In the concurring opinion of Chief Justice White, it is stated that the new prohibition created by the Constitution operates "throughout the length and breadth of the United States without reference to state lines" (p. 391).

It was further held by this Court that the enforce-

ment power confided to Congress "is territorially co-extensive with the prohibition of the first section."

The power of Congress to legislate for the enforcement of prohibition within state lines is derived from and limited by the amendment. *The National Prohibition Cases*, 253 U. S. 350. In the announcement of the conclusions of the Court by Mr. Justice Van Devanter, it is stated that the National Prohibition Act was adopted "to enforce the amendment" (p. 385); that the second section of the amendment granting to Congress concurrent power to enforce the article enables Congress "only *to enforce* it by appropriate means" (p. 387); and that "it is a constitutional mandate or prohibition that is being enforced" (p. 387). In the concurring opinion of the Chief Justice it is said that the "effect, of the *grant of authority,* was to confer upon both Congress and the States *power to do things which otherwise there would be no right to do*" (p. 392. Italics ours).

The authority of Congress to enforce the prohibition provided by the amendment appears, therefore, to be limited to the territory over which the amendment by its terms extends the prohibition.

It does not follow, however, that because Congress has power to extend the enforcement that far it has, in fact, done so by the Enforcement Act. On the contrary, as will be shown, it may be doubted that the Enforcement Act does actually extend even over all the territory to which the Court says prohibition has been extended by the Amendment.

5. *The National Prohibition Act analyzed as to territorial scope.*

The first point to be determined, therefore, is, to what places does the National Prohibition Act, by its own terms, purport to apply?

Title II of the Act deals with "Prohibition of Intoxicating Beverages." Section 3 of this title provides:

> "No person shall on or after the date when the eighteenth amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this Act, and all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented."

There is no express provision anywhere in the Act defining the places or boundaries within which it shall apply.

The only provisions in it from which the intent of Congress in this respect may be inferred are in Section 2, Title II, which provides that

> "The Commissioner of Internal Revenue, his assistants, agents, and inspectors shall investigate and report violations of this Act to the United States attorney for the district in which committed."

This implies that enforcement of the Act was expected only in organized Internal Revenue districts; in Section 11 of Title III which provides that alcohol may be with-

drawn under regulations from any industrial plant or bonded warehouse "tax free by the United States or any governmental agency thereof, or by the several States and Territories or any municipal subdivision thereof, or by the District of Columbia * * *," again implying that the enforcement limits and regulations are bounded by the political organizations of states and territories; and in Section 20, which specifically extends the Act to the Canal Zone. These provisions seem to imply that it is to extend only over the places in the states and territories that are organized into collection districts.

In the absence of definite statements in the Act itself, the extent of its application is to be found in other statutes. The principal one of these is Section 1891 of the Revised Statutes, which provides as follows (Italics ours):

> "The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect *within all the organized Territories and in every Territory hereafter organized, as elsewhere within the United States.*"

It would appear, however, that this general statute may not carry the Prohibition Act into all territory of the United States. For example, the Act of April 30, 1900, Chap. 339, creating the Territory of Hawaii, specifically provides that R. S. Section 1891 (above quoted) shall not apply to that territory; the Act of July 1, 1902; Chap. 1369, establishing the Government of the Philippine Islands, specifically provides that the provisions of R. S.

Section 1891 shall not apply to those islands; and the Act of March 30, 1917, Chap. 171, creating the government of the Virgin Islands, provides that, *unless Congress shall otherwise provide,* the laws regulating elections and the electoral franchise and the code of private law then existing in the islands, and the other local laws in force and effect there on the 17th of January, 1917, "shall remain in force and effect in said islands."

Even if it be assumed, as appears to be indicated by the decision in the *National Prohibition Cases* (pp. 386, 387), that the specific exemptions of Congress to the application of Section 1891 to some of the territories are invalidated by the amendment itself, yet as no territorial limits to the application of the Enforcement Act are found in it, recourse must still be had to Section 1891 of the Revised Statutes to determine the utmost extent to which the act can apply.

By that section of the Statutes, "the * * * laws of the United States * * * shall have the same force and effect within all the *organized Territories* and *in every Territory hereafter organized* as elsewhere within the United States."

This enumeration of localities would appear to be insufficient to include lands that are not within the United States proper, or territory that has not been organized as territory of the United States.

If the Amendment, for the lack of suitable enforcement legislation, does not as yet apply to all landed estate or territory subject to the jurisdiction of the United States, it seems obviously impossible to consider it as applicable to personal property such as ships.

6. *The National Prohibition Act does not by its terms apply and was not intended to apply to vessels of the United States on the high seas or in foreign ports.*

We have already referred to the fact that the National Prohibition Act did not attempt to define the limits of its application.

It has also been shown that from October 28, 1919, when the National Prohibition Act went into effect, up until the present time, it has been a matter of general knowledge that vessels of the United States have had on board intoxicating liquors as part of their sea stores which they sold on the high seas with the approval and under the authority of the United States Treasury decisions and regulations.

Bearing this in mind, the significance of the Act passed by Congress on November 23, 1921, known as *An Act Supplemental to the National Prohibition Act*, becomes immediately apparent, for that Act defines the limits of the application of the National Prohibition Act.

Section 3 of that Act reads as follows:

> "Section 3 (Territory affected by National Prohibition Act — Hawaii-Virgin Islands-Courts.) That this Act and the National Prohibition Act shall apply not only to the United States but to all territory subject to its jurisdiction, including the territory of Hawaii and the Virgin Islands; and jurisdiction is conferred on the Courts of the Territory of Hawaii and the Virgin Islands to enforce this Act and the National Prohibition Act in such territory and islands."

There is not one word in this supplemental Act which attempts to apply the National Prohibition Act to vessels of the United States.

In fact, it appears from Section 5 of the Act, that it was contemplated that distilled spirits might be in the possession of a common carrier subject to the Transportation Act of 1920 and the Merchant Marine Act, 1920, and exempted such carrier from paying a tax if the distilled spirits should be lost.

Congress as part of the Government at that time also knew that it was the practice of vessels of the United States with express Treasury sanction to have on board wines, distilled spirits and other intoxicating liquors as sea stores and to sell them to passengers on the high seas and in foreign ports, yet, there was not any attempt on the part of Congress to extend either the National Prohibition Act or the Act in question to vessels of the United States.

It is submitted, that it is obvious from an examination of Section 3, above referred to, that the word "territory" as used in the Eighteenth Amendment and the Act of November 23, 1921, meant, and that Congress considered it to mean *lands*, and not *things on the high seas.*

The only descriptive words in the National Prohibition Act which by any possible construction could refer to ships navigating the high seas, on which such purported violations of the Act could occur, are the words "boats" and "water craft", which appear in Section 3,

Title I, Sections 21, 22 and 26, Title II. The words "boats" and "water craft" are not words which are ordinarily and customarily used to designate ships capable of navigating the high seas, but are descriptive of small water craft. The nuisances referred to in the statute are such as might well be maintained upon such craft within the limits of the United States and the organized territories. District Judge Smith in *The Saxon*, 269 Fed. 639, regarded this phraseology of the Act as indicative of the character of the vessels which came within its scope. Said Judge Smith:

> "The words used as applicable to the means of transportation by water are 'water craft' and 'boat'. Ordinarily the term 'boat' and the term 'craft' are applied to water transporting conveyances of small character. As a rule, the word 'boat' is used somewhat in contradiction to the word 'vessel'—'vessel' being a boat of larger size, generally one fitted to navigate the high seas; while 'boat' as a rule was applied to an undecked, small, open vessel.
>
> "Anterior to the application of propulsion to small boats by means of gasoline, so as to bring them within the class of self-propelled vessels, the word 'boat' was usually applied to small, open vessels only, propelled by oars in the hands of oarsmen; although poetically, and otherwise, the term 'boat' may be sometimes applied to a vessel of any size. The word 'water craft' or the term 'craft' as usually used, was applied to small vessels generally engaged in coastwise or domestic navigation. For larger vessels, as used in the present day, especially, in the case of large iron steamships, the terms 'steamer', 'steamship', or 'vessel' are generally used."

It is again urged that it is reasonably to be presumed that Congress, when framing the enforcement act, was using words in their ordinary meaning.

In all the statutes of the United States, moreover, which contain provisions governing the navigation of vessels of the United States upon the high seas, or other provisions applicable thereto, including particularly the statutes defining crimes on the high seas, the descriptive words used are *"vessels of the United States."* If, therefore, it was the intention of Congress that the provisions of the National Prohibition Act should apply to vessels of the United States, consistency with a practice which has been uniform from the adoption of the Constitution would have dictated the use of the word "vessels", and not "boats" and "water craft" in describing such vessels. Cf. 4131 Revised Statutes, defining "vessels of the United States".

In this state of law, we submit that the National Prohibition Act cannot either by its terms or by any fair intendment, be made applicable to acts or things without the territorial limits of the United States and its organized territories and that consequently the vessels of the United States should be held entitled to sell intoxicating liquors on the high seas and in foreign ports.

THIRD POINT.

THE UNNECESSARY ADOPTION OF A FICTION IN CONSTITUTIONAL CONSTRUCTION THAT WOULD ATTRIBUTE TO THE WORD "TERRITORY" AS USED IN THE EIGHTEENTH AMENDMENT A MEANING WHICH WOULD INCLUDE VESSELS OF THE UNITED STATES UPON THE HIGH SEAS AND IN FOREIGN PORTS, WOULD LEAD TO EMBARRASSING INTERNATIONAL SITUATIONS.

That vessels of the United States are not territorial in an actual sense clearly appears from a consideration of the rights acknowledged in international law, and even in the municipal law, with regard to them. If they were actually territorial, they would be immune from the assertion of certain rights that may now be clearly raised against them. For instance, political refugees may be removed from them when they are in foreign ports, for there is no right of asylum on merchant passenger vessels for such purposes. *II Moore's International Law Digest, 855, 858.* They are subject to the jurisdiction of local authorities in foreign waters for the punishment of crimes committed on board in such waters. *Idem* 859; *Wildenhus Case,* 120 U. S. 1. Neutral merchant ships may be visited and searched upon the high seas, and seized and condemned by belligerents for carrying contraband of war. They may be seized, attached and sold under process *in rem* for claims in tort, or for debt, in our own or in a foreign country.

Furthermore this Court has recently held that a contract for the sale of a ship is governed by the law of the place where the contract is made and not by the law of

the ship's flag. *Gaston, Williams & Wigmore S. S. Corp.* v. *Warner*, decided November 23, 1922, not yet reported.

In fact the fiction of the constructive territoriality of ships has generally been disregarded by this Court whenever any substantial rights were involved.

> *Foppiano* vs. *Speed*, 190 U. S. 501.
> *Scharrenberg* vs. *United States*, 245 U. S. 122.
> *Gaston, Williams & Wigmore SS. Corp.* vs. *Warner*, Supreme Court, Nov. 23, 1922 not yet reported.

In *Foppiano* vs. *Speed, supra*, a ferryboat was owned by an Arkansas corporation and her owner was compelled to pay for a license to sell liquors on the ferryboat while in the City of Memphis, Tennessee. Among other arguments advanced for not paying the tax, the owner of the ferryboat contended that the ferryboat was part of the territory of Arkansas and therefore the State of Tennessee did not have any right to tax the sale of intoxicating liquors made while the boat was within the boundaries of the latter state.

The Court held that the tax was legal.

At p. 520, this Court said:

> "Here, however, there is no taxation of any property whatever, either of the boat or the plaintiff in error. He is simply called upon to pay a tax for the privilege of doing the business in which he was engaged—that is, retailing of intoxicating liquors at the bar of the ferryboat while that boat was within the jurisdiction of the State of Tennessee. The fact that he was so engaged within

> the actual territory of that State cannot be blotted out in such a case as this by any fiction suggested by the counsel for the plaintiff in error."

If this Government were to adopt, and introduce into its constitutional law, a doctrine of construction which would assert that vessels of the United States upon the high seas and in foreign ports are part of the territory of the United States, it would establish a principle which would unquestionably lead to international complications, and would result in a denial of practically all the foregoing rights. Particularly would such a doctrine embarrass the United States in any future assertion of her right of visitation and search upon neutral vessels on the high seas in the event of war. For such right is fundamentally opposed to the theory of territoriality as applied to ships.

Trade is international, and the application to it of a principle of purely domestic regulation, such as is embodied in the Eighteenth Amendment, will involve us in controversy with the other nations the moment the United States asserts the doctrine upon which those seeking to extend the Eighteenth Amendment to the high seas, necessarily ground their contention. The danger of this fiction has been clearly pointed out by W. E. Hall in his *Treatise on International Law*, at page 263:

> "International law indeed as laid down by these writers themselves is inconsistent with the principle which they uphold. It is admitted by the most thorough-going assertors of the territoriality of merchant vessels that so soon as the latter enter the ports of a foreign state they become subject to

the local jurisdiction on all points in which the interests of the country are touched; that when a vessel or some one on board has infringed the local laws she can be pursued into the open seas, and can be brought back, or the culprit can be arrested there; that in time of war a merchant ship can be seized and condemned for carriage of contraband or breach of blockade. Now it was long ago pointed out that if a merchant vessel is part of the territory of her state she must always be part of it. (Manning, 276.) The fiction is meaningless unless it conveys that a merchant ship is clothed with the characteristic attributes of territory, and among these are inviolability at all times and under all circumstances short of a pressing necessity of self-preservation on the part of another power than that to which the territory belongs, and exclusiveness of jurisdiction except in so far as it is abated by the custom of exterritoriality, which, of course, cannot be brought into use as against a ship. This however the fiction does not convey. Under the confessed practice of nations the alleged territorial character disappears whenever foreign states have strong motives for ignoring it. It cannot be seriously argued that a new and arbitrary principle has been admitted into law so long as a large part of universally accepted practice is incompatible with it, and while at the same time its legal character is denied both by important states and by jurists of weight."

This doctrine is essentially metaphorical in character, *Scharrenberg* v. *Dollar Steamship Company, Supra*, and now to advance it as a principle of legal right when unnecessary to the maintenance of any national right in our

international relations, would be a most unfortunate departure from accepted principles of international law.

Merchant ships at sea, or elsewhere outside the territorial limits of the country to which they belong, are not recognized, either in international law or in municipal law, as actual parts of the national territory, and they do not possess, at such times, the essential attributes or qualities of actual territory. Neither judicial authority, nor the opinion of writers on International law, nor the dictates of reason can justify the claim that ships are territory in any real sense; and if they are not territory in a real sense they cannot fall within the scope of the prohibition which is provided for "the United States and all *territory* subject to the jurisdiction thereof."

Judge Hand's decision below was put flatly on the ground that vessels of the United States are part of the territory of the United States. He disregarded entirely the decision of this court in *Scharrenberg* vs. *Dollar Steamship Co.*, 245 U. S. 122, and, by inference, extended the 18th Amendment to the Constitution to American vessels notwithstanding this Court's decision in *In Re Ross*, 140 U. S. 453, holding that the Constitution itself does not apply to an American vessel at sea or in foreign ports.

In a word he stretched the fiction of constructive territoriality of ships to the point of making the Constitution applicable where it had hitherto been held not to apply in order to avoid what he considered would be the inconsistency of allowing the use of intoxicating liquors on vessels of the United States when intoxicating liquors are prohibited on the land of the United States.

FOURTH POINT.

NEITHER THE HISTORY NOR PURPOSE OF THE EIGHTEENTH AMENDMENT AND ITS ENFORCEMENT ACTS INDICATE ANY INTENTION ON THE PART OF CONGRESS TO EXTEND PROHIBITION TO VESSELS OF THE UNITED STATES WHILE ON THE HIGH SEAS OR IN FOREIGN PORTS.

1. *A careful study of the debates of Congress in connection with the Eighteenth Amendment and the two Acts in question, has failed to disclose a single word which would indicate in any way that anyone in Congress ever contemplated that prohibition would apply to vessels of the United States.*

We have already shown that the Eighteenth Amendment, the National Prohibition Act and the Supplemental Act of November 23, 1921, do not contain any reference indicating an intention to extend the enforcement of the Amendment to vessels of the United States.

The silence of these Acts is especially significant in view of the Act of February 14, 1917, known as the Alaska Prohibition Law. That Act was intended to apply to vessels and it so expressly provided.

Section 29 of the Alaska Act, which was passed more than a year before the National Prohibition Act, provides as follows (italics ours):

> "That any person, company or corporation, who shall import or carry liquors into or upon the territorial waters of Alaska, *in or upon any steamer, steamboat, vessel,* boat or other craft, or

shall permit the same to be so imported or *carried into or upon said waters,* except under the provisions of this Act, shall be guilty of a misdemeanor and upon conviction shall be punished as provided in section 1 of this Act."

If, therefore, Congress had intended the National Prohibition Act or the Act of November 23, 1921, to apply to vessels of the United States, it is reasonable to conclude that it would have inserted a provision similar to that which it had inserted in the Alaska Prohibition Law—a law which had been passed only a year before the National Prohibition Act.

The general statutes of the United States have been held not to apply to the internal affairs of a vessel.

Brown v. *Duchesne,* 19 How. 183.
Taylor v. *United States,* 207 U. S. 120.
Scharrenberg v. *Dollar SS. Co.,* 245 U. S. 122.
United States vs. *Innes,* 218 Fed. 705.

The only exception to the rule above stated is in the case of statutes which are not dependent on locality for the Government's jurisdiction and which are enacted to protect the Government against obstruction or fraud where it appears that the obstruction or fraud which the statute is aimed at may largely take place on board ships or in foreign ports.

United States vs. *Bowman,* U. S. Supreme Court, November 13, 1922, not yet reported.

In *United States* vs. *Bowman,* this Court reviewed and reversed the ruling of the District Court for the South-

ern District of New York, sustaining a demurrer to an indictment under section 35 of the Criminal Code, charging a conspiracy outside the United States to defraud a corporation in which the United States was a stockholder.

Mr. Chief Justice Taft, writing for the Court, said (italics ours):

> "We have in this case a question of statutory construction. The necessary *locus,* when not specially defined, depends upon the purpose of Congress as evinced by the description and nature of the crime and upon the territorial limitations upon the power and jurisdiction of a government to punish crime under the law of nations. Crimes against private individuals or their property, like assaults, murder, burglary, larceny, robbery, arson, embezzlement and frauds of all kinds, which affect the peace and good order of the community, must of course be committed within the territorial jurisdiction of the Government where it may properly exercise it. If punishment of them is to be extended to include those committed outside of the strict territorial jurisdiction, it is natural for Congress to say so in the statute, and failure to do so will negative the purpose of Congress in this regard. We have an example of this in the attempted application of the prohibitions of the anti-trust law to acts done by citizens of the United States against other such citizens in a foreign country. *American Banana Company* vs. *The United Fruit Company,* 213 U. S. 347. That was a civil case, but as the statute is criminal as well as civil, it presents an analogy."
>
> "*But the same rule of interpretation should not be applied to criminal statutes which are, as a*

class, not logically dependent on their locality for the government's jurisdiction, but are enacted because of the right of the Government to defend itself against obstructions, or fraud, wherever perpetrated, especially if committed by its own citizens, officers or agents. Some such offenses can only be committed within the territorial jurisdiction of the Government because of the local acts required to constitute them. Others are such that to limit their *locus* to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute and leave open a large immunity for frauds as easily committed by citizens on the high seas and in foreign countries as at home. In such cases Congress has not thought it necessary to make specific provision in the law that the *locus* shall include the high seas and foreign countries, but allows it to be inferred from the nature of the offense. Many of these occur in Chapter 4, which bears the title 'Offenses against the operation of the Government'. Section 70 of that Chapter punishes whoever as consul knowingly certifies a false invoice. Clearly the *locus* of this crime as intended by Congress is in a foreign country and certainly the foreign country in which he discharges his official duty could not object to the trial in a United States Court of a United States Consul for crime of this sort committed within its borders. Forging or altering ship's papers is made a crime by Section 72 of Chapter 4. It would be going too far to say that because Congress does not fix any *locus* it intended to exclude the high seas in respect of this crime. The natural inference from the character of the offense is that the sea would be a probable place for its commission. Section 42 of Chapter 4 punishes enticing desertions from the naval service.

> Is it possible that Congress did not intend by this to include such enticing done aboard ship on the high seas or in a foreign port, where it would be most likely to be done? Section 39 punishes bribing a United States officer of the civil, military or naval service, to violate his duty or to aid in committing a fraud on the United States. It is hardly reasonable to construe this not to include such offenses when the bribe is offered to a consul, ambassador, an army or a naval officer in a foreign country or on the high seas, whose duties are being performed there and when his connivance at such fraud must occur there."

For upwards of three years after the passage of the National Prohibition Act, the United States Government itself placed the construction upon the Amendment and the Enforcement Acts that is here contended for by the appellant.

Great weight has always been given in this Court to the construction put on a statute by the Executive and the officers actively engaged in enforcing it. *Edwards. Lessee,* v. *Darby,* 12 Wheat. 206, 210; *United States* v. *Gilmore,* 8 Wall. 330; *Smythe* v. *Fiske,* 23 Wall. 374, 382; *United States* v. *Moore,* 95 U. S. 760, 763; *Brown* v. *United States,* 113 U. S., 568, 571; *United States* v. *Philbrick,* 120 U. S. 52, 59; *United States* v. *Hill,* 120 U. S. 169, 183; *Schell's Executors* v. *Fauché,* 138 U. S. 562, 572; *United States* v. *Alabama, etc. Ry.,* 142 U. S. 615, 621; *United States* v. *Taylor,* 207 U. S. 120, 125.

As has been previously pointed out, it was a matter of general knowledge that American passenger ships with Treasury sanction sold liquor to their passengers on the

high seas. They had always done so. And between the passage of the National Prohibition Act and the Act of November 23, 1921, they had been doing so for more than a year and a half. Nevertheless, Congress which had full knowledge of the practice referred to, passed the Act of November 23, 1921, defining the limits of the enforcement prohibition without extending it to ships.

2. *In considering whether Congress intended that vessels of the United States should be considered "territory" within the meaning of the Amendment and the Enforcement Acts, Section 20 of the National Prohibition Act is of great importance.*

After providing that it shall be unlawful to import or introduce into the Canal Zone or to manufacture, sell, give away, dispose of, transport or possess any liquor within the Canal Zone, Section 20 of the National Prohibition Act contains the following provision:

> "Provided that this section shall not apply to liquor in transit through the Panama Canal or on the Panama Railroad."

The only way in which liquor can be in transit through the Panama Canal is in ships.

Therefore, Congress in the very Act in question here, expressly stated that ships might carry liquor through the Panama Canal.

The Act does not limit the privilege to foreign ships, and it is not, of course, to be assumed that Congress would have thus extended such a right to foreign ships

with the intention to withhold it from our own ships in view of the fact that the Canal was built with American money.

The situation, therefore, comes down to this:

The very Congress which enacted the National Prohibition Act said that American ships might carry liquor in transit through the Panama Canal. This is merely another way of saying that vessels of the United States are not "territory" within the meaning of the Amendment and the Act because if Congress had intended a ship to be "territory" it would not have allowed them to carry liquor through the Canal. A ship cannot be "territory" on the high seas and not "territory" while passing through the Canal.

We have, therefore, an interpretation by the very Congress whose intention we are seeking, that they did not consider American ships "territory" within the meaning of the Amendment.

3. *It seems hardly conceivable that Congress would place an additional obstacle in the way of the establishment of an American Merchant Marine when the additional burden imposed was not essential to carry out the fundamental purposes of the Prohibition reform.*

There can be no question but that if the decision of the Court below is sustained here, it will be impossible commercially to operate American flag steamers in the passenger trades of the world.

In the first place, the great foreign transatlantic liners will always be able to sell liquor on their *west bound*

voyages. Against such competition the American lines will be seriously handicapped for Europeans will not travel by American steamers when they can come by foreign ships and enjoy their usual wine.

In the South American trade the foreign lines will be able to serve liquor on their northbound voyage. It will also be possible for the foreign ships on their southbound trips to stop at Bermuda or Havana and secure intoxicating liquors for the use of their passengers.

Against such competition, of course, the American lines to South America cannot live.

More serious still is the situation on the Pacific. Vancouver and Seattle are the two principal ports competing for the Far Eastern passenger trade. As foreign steamers can sail in and out of Vancouver to and from the Far East, it can be readily seen what little chance an American line will have with sailings between Seattle, for example, and the East. The result would be a great diversion of passenger business to a foreign country and foreign vessels.

If Vancouver becomes the gateway to and from the Far East, American railroads are bound to suffer a great loss in traffic.

In connection with this phase of the matter, it should also be remembered that the same Congress which enacted the National Prohibition Act, also passed the Merchant Marine Act of 1920.

This latter Act contains the following declaration of policy (Italics ours):

> *"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That it is necessary for the *national defense and for the proper growth of its foreign and domestic commerce that the United States shall have a merchant marine of the best equipped and most suitable types of vessels, sufficient to carry the greater portion of its commerce,* and serve as a naval or military auxiliary in time of war or national emergency, ultimately to be owned and operated privately by citizens of the United States; *and it is hereby declared to be the policy of the United States to do whatever may be necessary to develop and encourage the maintenance of such a merchant marine,* and in so far as may not be inconsistent with the express provisions of this Act, *the United States shall,* in the disposition of vessels and shipping property as hereinafter provided, in the making of rules and regulations and in the administration of the shipping laws, *keep always in view this purpose and object as the primary end to be obtained."*

It seems inconceivable, therefore, that Congress could have intended to extend prohibition to ships when the result of so doing would be practically to nullify the National policy of the United States with respect to shipping so far as passenger traffic is concerned.

It is submitted, that in the absence of any express provision by Congress extending prohibition to vessels of the United States, the construction which has been placed upon the Amendment and the Enforcement Acts by the Government itself, should prevail especially in view of the fact that an opposite construction would re-

sult in irreparable damage to the American Merchant Marine and, so far as passenger traffic is concerned, in the complete abrogation of the policy of the United States with respect to shipping as announced in the Merchant Marine Act of 1920.

In so far as preparation for national defense is concerned, the experience of the recent War shows that for the carriage of troops in any great numbers, an adequate fleet of passenger ships is necessary.

4. *Vessels of the United States engaged in foreign trade go to all parts of the world and are in competition with ships of foreign nations.*

They naturally meet with different conditions, peoples and customs. If they disregard the customs of the people with whom they seek to do business, it is obvious that there will soon be no business to do.

Whatever one's personal views may be on the subject of prohibition, it must be admitted that it is not possible for American passenger vessels which are dry to seek in foreign ports the patronage of subjects of those foreign nations whose customs and diet prescribe wines and other liquors.

In *Neilsen et al.* vs. *Rhine Shipping Company*, 248 U. S. 205, this Court had under consideration Section 11 of the Seamen's Act of 1915, Chap. 153, Stat. 1164, which prohibited advance payment of wages to seamen. The Court held that the statute was not to be construed in such a way as to prohibit advance payment of wages when made by American vessels to secure seamen in foreign ports.

At p. 213 the Court said:

> "It appears that only by compliance with the local custom of obtaining seamen through agents can American vessels obtain seamen in South American ports. This is greatly to be deplored, and the custom is one which works much hardship to a worthy class. But we are unable to discover that in passing this statute Congress intended to place American shipping at the great disadvantage of this inability to obtain seamen when compared with the vessels of other nations which are manned by complying with local usage."

The remarks of this Court in connection with the securing of crews in foreign ports, apply with equal force to the securing of passengers abroad.

This is the negative side of the matter.

The positive side is more perplexing still. Vessels of the United States will not be permitted by the laws of certain foreign nations, to leave their jurisdiction without having the usual wine on board for the use of passengers during the voyage.

The appellant in this case maintains a service between Antwerp and New York. Under the Belgian law no vessel is permitted to clear or leave a Belgian port unless it has on board, as part of its sea stores, a certain amount of intoxicating liquors for the use of the passengers during the voyage. If the decision of the Court below is sustained, it may be that the Kingdom of Belgium, through diplomatic exchanges, may be persuaded

to repeal this law but it is also possible and more probable that the Kingdom of Belgium will not agree.

In the latter event, appellant's vessels are likely to be given a choice between being tied up more or less permanently in Belgium, or breaking laws of their own country.

In any event, there will be no less liquor on the high seas because foreign ships will be able to comply with the Belgian law.

The only result, as a practical matter, will be to prevent American ships from engaging in the Antwerp-New York passenger trade.

The laws of Italy require a wine ration for passengers on westbound voyages. If American ships cannot comply with these laws, they must of necessity withdraw from this trade.

The more one looks at the entire situation, the more it is brought home that Congress did not and could not have intended to extend the prohibition to vessels of the United States while on the high seas and in foreign ports.

By the general law of nations, American vessels will be obliged to comply with the laws of foreign nations while in foreign ports. *Neilson* vs. *Rhine Shipping Co.*, 248 U. S. 205.

In that case, at p. 209, Mr. Justice Day said:

> "The very fact that our law applies to foreign vessels while in our ports is one of the strongest arguments why it should be held not to apply to our vessels while in foreign ports. In other

words, we should recognize the law of foreign countries with respect to our vessels in their ports, just as we expect foreign countries to recognize our law with respect to their vessels in our ports. This but accords with the general doctrine that when a merchant vessel of one country enters a port of another for the purposes of trade it subjects itself to the law of the place to which it goes. *Wildenhus' Case*, 120 U. S. 1, 11. The contracts between the ship and the seamen as well as the advances were made on shore at Buenos Ayres. 'The general and almost universal rule is that the character of the acts as lawful or unlawful must be determined wholly by the law of the country where the act is done.' *American Banana Co.* vs. *United Fruit Co.*, 213 U. S. 347, 356."

5. *The construction of the Amendment and the Enforcement Acts here contended for would not constitute an interference or limitation upon what everyone realizes is a great national reform.*

The liquor, which is the subject of this controversy, has already been shown to be a part of the sea stores of the vessels, intended for use upon the high seas and in foreign ports. None of it is manufactured, sold or transported within the territorial limits of the United States and none of it is imported into or exported from the United States.

In short, the liquor which as sea stores has become embodied in the ship, never leaves the ship but is consumed wholly upon the high seas or in foreign ports.

The present laws and regulations of the Treasury Department permit a ship only to have a reasonable amount of liquor on board as part of her sea stores.

Serious penalties are provided if any of the liquor is introduced into the country.

It is to the interest of this appellant and other American shipowners to see that these regulations are obeyed to the letter.

The only way in which any intoxicating liquors can, under the regulations of the Treasury Department, be introduced into this country or consumed while an American vessel is in the territorial waters of the United States, is by criminal action and this necessitates the breaking of Treasury seals which can be readily detected.

This Court will, perhaps, take judicial notice that there exists today a large body of persons, commonly referred to in the vernacular as "bootleggers" who will, and do take any means available to procure and sell liquor contrary to law.

If the decision of the Court below is sustained, steamship owners believe that a majority of the stewards and other minor employes of American vessels will become bootleggers. It is lawful to purchase liquor in foreign ports. To smuggle it on board a ship and hide it there would be easy and practically impossible of detection.

Stewards and other minor employees of American ships, tempted by large gains, would undoubtedly have available a sufficient supply of liquor for any of the passengers who might wish it.

In any event, the crews of American vessels, so soon as a ship touched at a foreign port, can reasonably be expected to stock up with whatever they may wish, at least for their own consumption.

As a practical matter, therefore, it is submitted that the practice of using intoxicating liquors would not be prevented by the contention made for the Government as to the scope of the Amendment and the Acts, and instead of an orderly efficient and lawful method of handling the liquors by responsible owners, the business would be carried on illegally by the crews.

So far as control over individual travellers is concerned, even if it were possible completely to stop the use of intoxicating liquors on American vessels, the most that could be accomplished would be that a traveller going to Europe would be prevented from taking intoxicants from five to seven days earlier than otherwise.

There would be no effect whatsoever on passengers coming from Europe to this country because such persons could and would travel by foreign lines.

To sum up, an affirmance of the decision of the Court below would result in the gradual elimination of the American flag from passenger trade on the high seas, and in more or less illegal dealing with liquors by the crew. On the other hand, the actual prevention of the use of intoxicating liquors would not be advanced because those wishing intoxicants could travel by foreign lines.

It is submitted, therefore, that the construction here contended for which would permit American ships to sell liquor on the high seas and in foreign ports, does not in any way affect the fundamental reform enacted in the Amendment by the Congress.

Congress did not state in the Amendment or in the Enforcement Acts that the Amendment or the Acts extended to vessels of the United States on the high seas or in foreign ports.

Prohibition should not be extended by implication when Congress has the power to legislate expressly under the Commerce Clause but has not done so and when to do so would involve the Merchant Marine of the United States in the international embarrassments above indicated.

LAST POINT.

THE DECREE OF THE COURT BELOW SHOULD BE REVERSED AND A PERMANENT INJUNCTION GRANTED AS PRAYED.

Respectfully submitted,

JOHN M. WOOLSEY
CLETUS KEATING
J. PARKER KIRLIN
IRA A. CAMPBELL,
Counsel for Appellant.

December, 1922.

SUPREME COURT OF THE UNITED STATES

[illegible]

[illegible]

Appellants,

v.

[illegible] STUDART [illegible]

Appellees.

UNITED AMERICAN [illegible]

[illegible]

Appellants,

v.

HENRY [illegible] STUDART [illegible]

Appellees.

MOTION TO ADVANCE

[illegible]

1

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1922.

INTERNATIONAL MERCANTILE MARINE COMPANY, Appellant, *against* H. C. STUART, Acting Collector of the Port of New York, *et al.*, Appellees.	No. 693.
UNITED AMERICAN LINES, INCORPORATED, *et al.*, Appellants, *against* HENRY C. STUART, Acting Collector of Customs for the Port of New York, *et al.*, Appellees.	No. 694.

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Sir:

PLEASE TAKE NOTICE that on Monday, November 13th, 1922, at 12 o'clock noon, or as soon thereafter as counsel may be heard, the appellants herein will submit to the Supreme Court of the United States a motion, a copy of

which is hereto annexed, petitioning said Court to advance the above entitled causes for early hearing.

Dated, November 1, 1922.

CLETUS KEATING,
REID L. CARR,
Counsel for Appellants.

To:

HON. HARRY M. DAUGHERTY,
Attorney General of the United States,
Counsel for Appellees.

7

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8

9

On Appeal from the District Court of the United States for the Southern District of New York:

The appellants move that these causes be advanced for hearing at an early date.

I.—These appeals are taken from final decrees of the District Court of the United States for the Southern

10 District of New York in each case dismissing the bill of complaint.

II.—The decision of the District Court from which these appeals are taken affects all American vessels in American territorial waters, on the high seas and in foreign ports.

III.—The bills of complaint prayed for an injunction restraining the defendants from enforcing or attempting to enforce against the complainants or their vessels any
11 of the forfeitures or penalties provided for in the National Prohibition Act by reason of the carriage by their vessels within the territorial waters of the United States of intoxicating liquors kept on board their vessels as sea stores and intended for the use of the passengers and crews of the said vessels outside the territorial waters of the United States, and also by reason of any sales of liquor carried as sea stores which may be made on the high seas or in foreign ports on said vessels.

IV.—The complainants-appellants are corporations
12 incorporated in the United States, and the vessels owned by them fly the flag of the United States, and are owned and registered within the United States.

The bills of complaint were filed to restrain the threatened acts of the defendants, to make and carry out orders following an opinion of the Attorney General of the United States which held that American vessels were violating the provisions of the Eighteenth Amendment and the National Prohibition Act by keeping on board while in the territorial waters of the United States in-

toxicating liquors in the sea stores of said vessels which 13
were intended for the use by passengers and crews of the vessels outside the territorial waters of the United States.

The ruling of the Attorney General above referred to is contrary to the opinion of a previous Attorney General and to the existing regulations promulgated by the Secretary of the Treasury.

V.—The necessary jurisdictional facts appear in the bills of complaint.

VI.—Due notice of the presentation of this motion has 14
been given to the Attorney General of the United States, counsel for the appellees.

VII.—An early hearing of this appeal is, in the opinion of counsel for the appellants, desirable in the public interest as well as in the interest of the complainants-appellants themselves, and all other American steamship lines similarly situated.

CLETUS KEATING,
REID L. CARR,
Counsel for Appellants. 15